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INSURANCE ISSUES AND SUPERFUND

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INSURANCE ISSUES AND SUPERFUND

WEDNESDAY, APRIL 3, 1985

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10:08 a.m., in room SD-406, Dirksen Senate Office Building, Hon. Robert T. Stafford (chairman of the committee) presiding.

Present: Senators Stafford, Simpson, Symms, Domenici, Bentsen, Burdick, and Mitchell.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. The committee will please come to order.

We are going to start as promptly as we can because the issue is an important one and we have many witnesses. We apologize to all who are standing, but as a lifetime politician, I have always enjoyed seeing a room crowded with standees in preference to one in which there are a lot of empty chairs.

I have been advised that for those who might prefer simply to hear and not view the proceedings that can be done in room 608, if anyone prefers that.

This morning's hearing is on insurance issues which have arisen in the course of extending the Superfund. During the past several weeks, we have heard the following: First, those involved in Superfund cleanups have contended that insurance is either unavailable or unavailable at any reasonable price. Asbestos removal contractors have told us the same thing.

Second, those who store, treat, dispose, or handle hazardous substances have also told us that insurance is either unavailable or unavailable at any reasonable price.

Finally, the domestic insurance industry has said that, because of uncertain liabilities, it will no longer offer pollution liability insurance.

The purpose of this hearing is to determine whether these complaints are correct and what, if anything, can or should be done about them. Clearly, it is in the public interest for cleanup work to continue to be done. Equally, it is in the public interest to ensure that only competent and financially secure individuals are engaged in the treatment, storage, disposal, or other handling of hazardous substances.

It is unclear whether the Congress could or should address the third set of complaints, that is, those of the domestic insurance industry in order to achieve the first two objectives. Some representatives of the insurance industry have recommended that Superfund law be amended in a radical way. They have estimated the financial threat to the insurance industry could well be in excess of $20 billion, perhaps as high as $100 billion. They contend that this threat warrants changes in liability, vastly increased taxes, and a retroactive modification of insurance contracts.

Those suggesting such changes bear a very heavy burden of persuasion. There is some evidence that the industry is facing a crisis of its own creation. It is also not at all clear that the industry would provide environmental insurance even if the Congress granted each and every one of these requests.

This is not to say that help is not needed or that it will not be provided.

The taxpayers of the United States bailed out both Chrysler and Lockheed, but this was not for the sake of those two corporations. It was for the millions of Americans who otherwise would have lost their jobs. In this case, many of the suggested changes would injure ordinary citizens, not help them. Eliminating liability might be a good solution for the insurance and chemical industries, but it is not for the innocent victims of toxic chemicals.

Our job is to determine whether there is a problem and, if so, what a proper solution may be. It is a judgment which we must make from the perspective of the American public, not from a single industry's point of view.

I look forward to hearing from our witnesses. I believe all of the witnesses who will appear this morning have been carefully and emphatically warned that their time will be strictly limited. We apologize for this, but it is simply a matter of necessity.

Senator Burdick, do you have an opening statement?

Senator **Burdick**. No, thank you.

Senator **Stafford**. All right. Senator Symms?

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator **Symms**. Thank you, Mr. Chairman.

I appreciate the fact that we are having this hearing. I look forward to hearing from the witnesses. I do think that this is a critical hearing, and I appreciate your holding it.

The action that this committee and the Senate takes is critical as to what the future of the cleanup of toxic wastes will be, and I hope that something can come from this to guide us toward a solution. Without an answer to this question, the cleanup of the waste dumps in the country will be severely slowed and people would not like that to happen.

I appreciate being here.

Senator **Stafford**. Thank you very much, Senator Symms.

The Chair, if there is no objection, will reserve the right for other members of the committee, as they are able to get here from different assignments, to place any statements they may have in the record and the Chair would especially reserve that right to the ranking member, Senator Bentsen, to have whatever opening statement he may wish to make or to place in the record follow immediately after my own.

OPENING STATEMENT OF HON. LLOYD BENTSEN, U.S. SENATOR FROM THE STATE OF TEXAS

Senator **Bentsen**. Mr. Chairman, the recent OTA report on Superfund sites underscores a problem of concern to all of us. Our goal is to clean up the Nation's dangerous contaminated waste sites, but there is not yet agreement over the scope of the job or how long it will take.

We can agree that it will be expensive, and that these expenses create problems which might interfere with our goal.

I requested these hearings to look into what appears to be a decreased availability of environmental liability insurance, and to consider the possible effects of this situation.

From the outset, it would appear to me there are at least three areas to cover:

What do we do about architect/engineering and construction contractors and equipment vendors who might be prevented from Superfund cleanups because insurance is not available at affordable cost?

Is there an issue of RCRA and CERCLA financial responsibility requirements threatening to close hazardous waste management facilities?

Should we consider some type of relief to casualty insurance companies from claims under past "occurence" policies which they say threaten their reserves?

Our witness list today indicates that we may hear several suggestions of which way to go, and we welcome these comments. In our efforts on this issue, we must bear in mind that November 8, 1985, is the current RCRA deadline for hazardous waste facilities to certify their compliance with financial responsibilities requirements.

We need the Superfund cleanups. To those who would do this necessary job, insurance is a business necessity. If there is a problem, we need to get it out in the open and do something about it.

I thank our chairman for calling this hearing and I look forward to our discussions in hopes that these important Superfund cleanups will not be delayed.

Senator **Stafford**. Having said that, we will go to the first panel which consists of the Honorable Henry Habicht, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC; and the Honorable Gene A. Lucero, Director, Office of Waste Programs Enforcement, U.S. Environmental Protection Agency.

Gentlemen, whichever of you is going first can go right ahead at this point.

STATEMENT OF HON. F. HENRY HABICHT II, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY GENE A. LUCERO, DIRECTOR, OFFICE OF WASTE PROGRAMS ENFORCEMENT, ENVIRONMENTAL PROTECTION AGENCY

Mr. **Habicht**. Thank you very much, Mr. Chairman.

We recognize that you have a great deal to accomplish this morning, and we will endeavor to be brief. I think that both Mr.

Lucero and I can serve you most effectively by being prepared to respond to questions.

I have a written statement that, with your permission, I would like to have entered in the record, and I would perhaps begin by summarizing briefly the elements of that statement.

Senator **Stafford**. Yes, before you do that, and I appreciate your doing that, let me also make the blanket statement, unless there is objection, and I don't anticipate one, we will place each witness' full statement in the record so that if time runs out, your statement will be there in full so that members of the committee and staff can study it. Now, I won't interrupt you again.

Senator **Burdick**. Excuse me, Mr. Chairman.

Senator **Stafford**. Yes.

Senator **Burdick**. Would the witness state his name?

Mr. **Habicht**. Yes, sir, Senator. My name is Henry Habicht, Assistant Attorney General for Land and Natural Resources at the Department of Justice. As the chairman indicated, with me is Gene Lucero, who is Director of Hazardous Waste Enforcement at the Environmental Protection Agency. He has a broad perspective on Superfund and RCRA enforcement, and is familiar with a number of the insurance questions that have been raised about that program.

From my perspective, Mr. Chairman, I have been familiarizing myself with the concerns that the insurance industry has been expressing recently about hazardous waste enforcement and how enforcement affects the industry. I know that their concerns are deeply held. I have spent some time with industry representatives, and I intend to continue to do so in the future.

I think we recognize that their concerns can be divided. While they may be related, they can be divided into concerns about insuring future activities and concerns that relate to the effects of Superfund enforcement which, of course, relate to activities that have already occurred and already are either insured or not.

I am going to focus mostly on Superfund for just a couple of minutes to help give the committee a sense, from our perspective, of how enforcement fits into the Superfund implementation program. We can certainly answer questions that relate to other issues, as well.

As the Administrator, Lee Thomas, has said before, we believe that enforcement has a critical role, an integral role, to play in Superfund implementation, based on a couple of basic principles. First, that cleanup funds contributed by private parties and cleanup performed by private parties themselves are essential to making this an effective and efficient program. It is a major task, and the parameters of the task have been set by the Congress. The question is the degree of participation by the private sector and the public sector in that process.

Second, we think that effective enforcement against responsible parties will help keep the Superfund program from becoming a massive public works program. We think that the liability rules that are implemented and sorted out through the court system, and tested in the courts are a more accurate way of assessing the costs of this problem on the parties responsible than is a massive tax, which is necessarily more arbitrary than liability rules that are subject to court review and court enforcement.

Our goal is to set up a vigorous program that enlists private parties in the cleanup enforcement process, and that actually makes them part of the enforcement process. The goal is to achieve at enforcement sites, sites at which we are taking enforcement action, placement of 100 percent of the cleanup costs on 100 percent of the responsible parties. The question is what is the best way to accomplish that goal under the legal rules that are being sorted out and that have been sorted out over the last few years. It is an enforcement program that we have helped structure with EPA to dovetail with their fund financed cleanup program, so that the whole process can move forward in tandem.

The program is built on judicially determined and judicially announced rules that have been sorted out in the courts over the last few years. Despite the dislocation that sometimes occurs during a sorting out process, particularly when a massive new statutory program is involved, great success has been achieved in the enforcement program even in the first few years, as this committee is aware. Just in judicial enforcement, we have entered into consent decrees with private parties that reflect approximately a quarter of a billion dollars in privately financed cleanup—$250 million in estimated costs of cleanup being borne by private parties. EPA, in its Administrative Cleanup Program, in which we are not always involved, has additional settlements reflecting quite a bit more money.

More importantly, over the last few years, we have developed a system of rules, relationships, and incentives based upon the early court decisions and the 1980 statute that we think are making this process an effective and an efficient one and that will allow us to reach the enforcement goals that Lee Thomas has described in his testimony relating to the reauthorization. We think that that enforcement will result in a substantial amount of cleanup in the coming years.

Again, as I indicated, the goal is to provide incentives and tools for private parties to coalesce, to come together and reach a consensus on how to approach a given site. A climate that encourages every man for himself, we believe, is counterproductive to the need for cooperative solutions and the need to move forward. So, in order to implement this system of incentives for private parties to coalesce, we want to provide private parties the ability to come together and approach these sites with the Government and, again, to do a good bit of the work themselves.

First of all, with EPA, we provide to all responsible parties at a site all the information we have about all other responsible parties at the very beginning of the process so they understand the basic information about the site. They understand who their colleagues or counterparts are at a given site. They can immediately start talking with one another even before any formal action is taken.

We also provide responsible parties the opportunity to engage in the initial actions to remove emergency threats to public health, the removal actions. We are also providing more and more opportunities for responsible parties to participate directly in the process of doing the remedial investigation and feasibility study that determines what has to be done to protect the public at a given site.

In the RIFS process, we are having a more public process and are building a more formal administrative record, so when responsible parties have ideas for approaching the site or for approaching the technical analysis—cheaper solutions and so forth—those can be put formally on the administrative record. This record will, if necessary, become part of the record for litigation later on, and will streamline litigation by creating a formal record for judicial review.

If parties do not reach agreement with EPA on a cleanup, the case can result in either a fund financed action, an administrative order by EPA, or a referral to the Department of Justice for litigation. We will select defendants based on the best information we are able to develop in a reasonable period of time, and we will select defendants who represent the vast majority of waste by volume at a site. As we have said before, and I think it is important to reiterate, we will not and we don't believe that we can, under the liability scheme that is being sorted out in the courts, impose liability on private parties that is grossly out of proportion with their factual contribution to the problems at a site.

Senator STAFFORD. Are you in a position now to summarize your statement?

Mr. HABICHT. Yes, sir. In fact, I think I have——

Senator STAFFORD. All right.

Mr. HABICHT. Another moment—I was also going to indicate that not only do we select defendants who represent the majority of waste at a site, but we have a settlement policy that continues to provide incentives for settlement. In the administration's proposal and in our settlement policy, we provide for contribution against other responsible parties and protection from contribution for responsible parties who settle with the Government. We provide for settling cases for less than 100 percent of the cost at a site when the facts warrant. We are providing for cashing out by extremely small contributors to a site. We also provide for phased settlements, so that a group of defendants who want to come forward can settle and the Government will endeavor to go after other responsible parties for other phases of the cleanup.

At the Enviro-Chem site, for example, this led to 254 generator defendants banding together voluntarily and presenting a surface removal program, letting the rest of the cleanup proceed in due course.

In sum, Mr. Chairman, we think that the system that has evolved over the last couple of years—a system of clear rules, sharing of information, and incentives for private parties to act as a group to pay the costs of cleanup and actually undertake some of the cleanup—is being effective, and we think ultimately it is going to lead to a good bit of cleanup without litigation. It will help parties develop more effective long-term solutions to the hazardous waste problem and decrease unnecessary demands on the fund, ultimately better serving the public in moving on with this important process that the Congress has developed.

Now, Mr. Lucero and I are available to respond to questions.

Senator **Stafford**. Thank you. As we understand it, Mr. Lucero, you were not planning to make a statement?

Mr. **Lucero**. That is correct.

Senator **Stafford**. All right.

I would suggest to my colleagues that, to the extent we can, in view of the number of witnesses that we have, that we put questions to our witnesses in writing for response in writing. I think they will be agreeable to doing it that way, but we will ask some questions here. I suggest we try to limit ourselves as to time. Without setting a specific time for questions at this point, let's see how we go.

Do either of you anticipate that replacing the present liability standard with a mandatory apportionment scheme would affect the pace and effectiveness of the Superfund Cleanup and Apportionment Program?

Mr. **Habicht**. I might just say from the perspective of the people who are enforcing this statute in court, we have certainly been looking at that issue, as we look at what is the most effective way of implementing the statute. I think that when apportionment of harm is reasonably possible, when apportioned shares can be established with reasonable certainty, joint and several liability is not applicable under the current liability scheme. The parties have an opportunity to prove whether apportionment is reasonably possible. We think as I indicated in my statement, that mandatory apportionment creates an "every man for himself" climate.

If the Government doesn't have the ability, at least in the initial phases, to avoid these difficult questions of apportionment, if the Government were to have the burden of proof on these kinds of issues, it would become an unmanageable program. Either we would have to forego litigation, or litigation from the standpoint of resources, that is, going in and litigating over each individual's precise share, would be quite costly. I think one of the reasons for that is that apportionment is not only done on the basis of volume, but, as many people who are associated with these sites know, how much the remedy costs depends very much on what kinds of things you are dealing with, not only how toxic they are, but how quickly they move through the soil and how difficult they are to clean up from groundwater and other resources.

As to how the pace of the program might be affected, I think Mr. Lucero of EPA may have some thoughts on that as well.

Mr. **Lucero**. Senator Stafford, I would like to add a comment on that.

Senator **Stafford**. Sure.

Mr. **Lucero**. As Mr. Habicht has said, we conclude that if we were to go to some sort of upfront mandatory apportionment scheme, there would be several results. One is that it would delay cleanups ultimately. It would also make it a much more complex program for the administration or the Government to manage in that we would be forced to deal with a number of issues that we are now able to give to the private parties in a suit and force them to deal with.

Apportionment is one of those issues that the parties must resolve among themselves.

Where I would like to go beyond what Mr. Habicht said is that not everyone realizes that the enforcement component of Superfund is very closely tied to the fund cleanup activities, and that at every site we look at both opportunities as a way of possibly promoting the fastest cleanup. The reason we are able to do that is that the enforcement program can move at least fast enough to keep with the fund-financed cleanup program. Any suggestion of an additional mandatory step that slows down and makes more complex the enforcement program would break off this close tying together of the two components, enforcement and fund-financed cleanup.

Frankly, I am afraid that since, as I see it, the enforcement program would have to move much more slowly to deal with an apportionment program, there would be a large number of sites where private parties would not be looked to for the work. We might ultimately look to them for cost recovery, but our preference now is to look to private parties to do the work at the site if they are ready, willing, and able at the moment we are ready.

Senator **Stafford**. Thank you.

What effect does the Superfund liability standard have on the pace and effectiveness of cleanup and management of hazardous waste?

Mr. **Lucero**. I would like to highlight a couple of points, Senator Stafford, in this regard. The standard right now is a standard that makes it easier for the Government, not that easy, but easier for the Government to organize its case. Our focus has been primarily on developing what the appropriate remedy is and identifying the parties that are associated with the site.

The standard is a very tough one for responsible parties, and it forces them—it gives them an incentive to come forward since they are all potentially liable, in some cases, for the whole thing. They have an incentive to get together to try to solve their problem.

A different standard, that is, to remove joint and several liability, where the Government would have to go in and establish what each party's relationship was to the site and its liability for that, would require us not only to spend more time but we would end up dealing party by party as a means of discussion. Some of our cases have in the neighborhood of 300 individual parties involved, and that would possibly result in 300 separate settlement discussions. It would be very hard for the Government to force that group to coalesce other than the normal pleading and whatever.

Therefore, it would be seriously disruptive, especially in those larger cases, if we didn't have the kind of coalescing mechanism that joint and several liability forces. We would be very much concerned as to what that would do, again, to the enforcement program if we were to change.

We also know that if there is even a sort of subtle adjustment in this area, where the courts have been interpreting the standard of liability based on the structure of the statute, legislative history, and previous tort law, any subtle changes in this area which have been thought about by various people raise the question of whether that changes the basic structure of the liability standard. We have spent 4 years establishing the program. It would be very difficult for us if we suddenly had to go back and litigate for another 4 years to try to reestablish what it meant.

Mr. **Habicht**. Mr. Chairman, if I might very briefly add a perspective to that, and that is, it is important to recognize, as you look through these issues, that the fundamental premise is that there is some, at this point not liquidated, but predetermined number of sites that have to be cleaned up to a certain level. What kind of scheme there is for deciding who pays what share doesn't affect the number of sites requiring cleanup. So, you have an extremely large amount of cleanup required, and the question is how do you most appropriately allocate the costs of that cleanup.

I think it is important that we proceed from that premise. When we have a site that has a lot of different wastes, the whole site has to be cleaned up. As Mr. Lucero said, and as we have said before, ultimately the settlements that are reached in these cases are going to reflect a substantial percentage of the waste being taken care of by parties not greatly out of proportion to their actual contribution at a site, but the joint and several liability standard does speed up the process because it enlists the parties in the process of helping to bring, gives them the incentive of helping to bring people together.

Senator **Stafford**. Thank you.

I have one more question I will ask you here, and then several I may submit to you for response in writing.

My last question here is, Does the current hazardous waste management insurance problem indicate that, based on experience to date, the private sector will be unable to provide future coverage?

Mr. **Lucero**. Perhaps I should answer that.

Senator **Stafford**. All right.

Mr. **Lucero**. We at the Agency have been very concerned about the representations. We have been meeting with a number of different parties, including representatives of the insurance industry, representatives of the contract community, contract engineering firms who have raised the question. We have also heard from people who are regulated under the RCRA program and required as a means of providing financial responsibility to show that they have insurance. A number of people have raised the concern that it is very difficult to get insurance or it is also very expensive.

We have been looking at the causes of the problem, and they are basically tied to—I am sure you are going to hear in great detail shortly from a number of those representatives—the structure of the contract forms that the insurance agencies use. In our discussions with them, it is clear that there are ways to solve that contract problem.

As to future problems, it would seem that an adjustment in the current writing of the insurance contract between the insurer and the insured could deal with some of the problems that have been created by ambiguities in the previous contracts.

As Mr. Habicht indicated, and I would like to emphasize, there are two kinds of problems we are dealing with here. The insurance industry is concerned about its retroactive or retrospective liability, and it is concerned about how it will manage its involvement in the future. Without talking to the first problem, your question dealt with the second one.

We think—and we are willing to work with the industry to talk about what information we can provide, what kind of language they might be considering, and whether it meets our needs—we believe they can solve the problem. The one thing we are very concerned about is that no one seems to want to talk about the future problem, the future liability issue, the future insurance problem, because everyone wants to focus on the retrospective problem. We need some commitment from the industry to get on with those discussions.

Senator **Stafford**. All right, gentlemen. Thank you very much.

For the sake of Senator Mitchell, I will say we have reserved the right for members to place statements in the record if they have them immediately following my own and Senator Bentsen's. Most of the witnesses are being limited to 5 minutes for presentation, but their full statements are being placed in the record. We have placed no time limit on members for questions, but in view of the number of witnesses we have and after the first round here, the Chair may suggest a 5-minute limit on questions to be asked directly, and we have reserved the right to all members to place questions in writing to the witnesses in the hope that we can finish this by noontime.

Having said all that, Senator Burdick, you are next.

Senator **Burdick**. No questions, Mr. Chairman.

Senator **Stafford**. Senator Burdick has already saved us 5 minutes.

Senator Symms?

Senator **Symms**. Thank you very much, Mr. Chairman. I will try to be as brief as possible.

Mr. Habicht, your boss, Attorney General Meese, has made statements in some of his public speeches recently and suggested that Federal legislation should not only encompass a budget impact statement, but we have taken it for granted we have an environmental impact statement but that we should have a judicial impact statement. I was just wondering if you think that this particular subject of the liability question with respect to the entire Superfund and toxic waste cleanups would be a good place for us to apply that and, if so, how would we go about it?

I ask that question in view of the fact that if you look at the entire insurance industry, some of these issues like medical malpractice are completely out of hand, yet it seems as though when Members of Congress or others make efforts to impose some limits, there is always a great resistance on the part of the trial lawyers in the country. Insurance rates continue to go up and there is a constant squeeze on the ability of people to pay for different kinds of liability insurance, whether it be fire, crop insurance, medical malpractice, or whatever. It seems like there is no end to it. What about this question? I am not a lawyer, but it looks like a gold mine for a lawyer to me.

Mr. **Habicht**. Senator, I recall Senator Domenici at one of the earlier hearings on Superfund——

Senator **Symms**. Said the lawyers were salivating in this room, I think he said.

Mr. **Habicht**. That is right, that a lot of lawyers were getting very excited about it, and we are extremely concerned about it. I think at Justice, particularly in a division like ours, where our stock in trade is litigation, there is nothing more important to us than limiting the scope of litigation, trying to resolve cases without litigation, and keeping cases out of the courts as much as we can consistent with our obligations to the public. I think that the idea of a judicial system impact statement, of course, is an extremely good one.

At this point, the Attorney General is very interested in that, as we are. The criteria haven't yet been formulated, but that is something we are working on at Justice, to determine what is an appropriate way of measuring a justice system impact.

I think that in the context of Superfund, although we are not in the process of a formal justice impact statement, we can shed some light on potential impacts. We have been looking, over the last couple of years, as I indicated, at how much this enforcement program is costing, at how we can streamline litigation, and at how we can make it more manageable. We think the ways that we have been going with the program, given the goals of Superfund, have been, as time goes on, focusing the program. For example, the record review of remedial decisions in court will dramatically streamline litigation over remedy. We think that the liability scheme, and the consequent enlisting of private parties in the process, will lead to more settlements without litigation.

I think those questions are important ones, and we will do the best we can in the time available to the Congress to look at justice systems impacts, because limiting litigation is important. I think that the concept also applies to some of the other issues Senator Domenici was addressing last time, such as the provision of new citizen causes of action and various other proposals. Such new causes of action will tend to increase litigation, as opposed to enforcement which is developing something of a record. Those kinds of things are important to consider.

Senator SYMMS. How big of a portion of the Justice Department's attention is now being paid to Superfund litigation, or is most of that being done in the private sector currently? How much are you involved at this point?

Mr. HABICHT. We have a significant involvement of personnel. I could get it for you for the record, a more accurate statement of exactly what kind of resources we are devoting to Superfund litigation. I think it is fair to say that the private sector is devoting a lot more than we are. We have found that judicial enforcement thus far, has been very cost effective in terms of the settlements and the progress in cleanup as measured against the actual Superfund outlay, and I think it is going to be increasingly so.

Senator SYMMS. If this becomes a massive transaction cost to hire attorneys to defend the parties that are involved, what I am trying to get at is how many more toxic waste dumps do you think we could clean up if we spent the money on engineering instead of lawyering?

Mr. HABICHT. I know there has been some speculation about the level of costs, both past and projected. I think, I believe sincerely, that the costs are going to decrease over time, the costs per case are going to decrease over time as the rules are sorted out and——

Senator SYMMS. If we solve the problem. You are just making the assumption that there will be a solution so the thing will move forward. If the insurance companies won't write insurance on it, then what is going to happen?

Mr. HABICHT. Well, again, that is the kind of thing that the committee is having these hearings——

Senator SYMMS. I shouldn't say won't, but if they feel that they can't do it because they can't stand the exposure, then where are we?

Mr. HABICHT. Well, the important thing is that the major Superfund litigation that we will be involved in at Justice will involve sites that are either already insured or not insured and the damage has already been done. So, I don't perceive that that has an effect on a future willingness to insure.

I think one of the questions, and this is an important one, that we have asked as we have formulated positions on this issue, is whether enforcement will involve significant transaction costs. If you have an enforcement scheme—so one of the questions is, Is enforcement an important part of the program? We think that it is because it gets private participation. Based on what we have seen, on our experience and other proposals, we believe that the enforcement scheme that we have been developing involves in the long run lower transaction costs than something that would require litigation over each individual's share and that would provide an incentive for each individual to litigate because they would all be treated separately.

Senator SYMMS. OK, then my last question, Mr. Chairman, and right in line with this answer, What then do you advise this committee to do to help lower transaction costs so more money will be spent in cleanup and less money will be spent in legal struggles?

Mr. HABICHT. Again, proceeding from the premise that enforcement is an important part of the program, and particularly an enforcement scheme that gives the Government the ability to impose liability on the parties responsible, we think that the approach that we have evolved and the approach that we have suggested in the amendments that we have proposed will, in the long run, allow an enforcement scheme to proceed that will be effective and will, in the long run, minimize transaction costs. We have not seen alternatives to our approach that would embody effective enforcement and that would have lower transaction costs, but part of this process is for us to hear what everyone else has.

Senator SYMMS. And those recommendations are before the committee, then?

Mr. HABICHT. Yes, sir.

Senator SYMMS. The amendments. How many amendments are we talking about?

Mr. HABICHT. About 6 to 10, I believe.

Senator SYMMS. OK. Thank you very much.

Senator STAFFORD. Thank you very much, Senator Symms.

Senator Mitchell?

Senator MITCHELL. Thank you, Mr. Chairman.

One of the deficiencies of the procedure we follow is that you come and make a statement and leave and then the insurance industry comes after you and makes statements which are contradictory to yours and then they leave, and we never get adjoining views as you do in courtroom proceedings which have been described here in unflattering terms. So, let me, if I might, ask you some questions which arise out of the presentations that will follow you.

The American Insurance Association has made a proposal what they call to "reform and expedite cleanup under Superfund." I would like to quote just a couple of statements in that and then ask you a few questions based upon that.

They say:

> The foundation of the Government's litigation strategy is the imposition of joint and several liability for the entire cleanup costs on any party enumerated in section 107 even if that party is a de minimis contributor to the site and the liability is out of all proportion to the party's status or conduct.

They go on to say at a later point:

> The Government will bring a law suit against the company if it contributed any compound or mixture which has a single hazardous substance as one of its constituents even if the company's contribution cannot be shown to present any actual hazard.

Now, wholly apart from what the law might say, if there is such a thing as fundamental fairness in our society, isn't it fundamentally unfair to say to someone who has contributed to 1 percent of the problem that you will be responsible for 100 percent of the cost of solving the problem?

Mr. HABICHT. I think, Senator, as I have indicated at prior times, and I think that this view would be shared, that not only would I personally view that as unfair—again, you are talking about a whole array of fact situations—but we have not imposed and certainly don't intend to impose liability grossly out of proportion to someone's actual contribution. There will be, in the long run, very minor deviations between what is ultimately shown to be the actual contribution and what a party ultimately has to pay.

I don't think a court, frankly, would permit it. Joint and several liability is not a rigid hard and fast rule. It is a rule based on equity, and parties will have that and will argue if they feel that liability is being imposed grossly out of proportion with the factual contribution.

Senator MITCHELL. So, is the insurance company inaccurate in these statements? Are these statements incorrect in fact?

Mr. HABICHT. We have not, and I will turn to Mr. Lucero also who has a broad perspective on the program, we have not and don't intend to and I don't think that we can impose liability for 100 percent of the costs on a de minimis generator.

Senator MITCHELL. If that is so, then why do you object to abolishing joint and several liability? If you agree that the results stated would be unfair, and you have indicated that you do not seek to utilize joint and several liability to the extent which is possible under its literal application, then why would you not agree to modifying it to permit some alternative form in which liability could be apportioned in some reasonable relationship to responsibility?

Mr. LUCERO. Senator, if I might respond to that, let me say that it helps to understand how we use joint and several liability in fostering settlements to understand the answer I would like to give to your question.

When we have identified, through our investigation, the responsible parties at a site, we send notice letters to all those parties and indicate that the evidence is that they have some connection through disposition or deposition of waste at that site. We bring them together or we seek to have the parties bring themselves together to discuss how they might wish to approach the remedy.

At that stage, we are pointing to joint and several liability and saying there is a possibility that you may be liable, and you may be liable for a large proportion. What happens at that point is that that possibility, as well as some other interpretations that the courts have given, drives the parties to start talking together about how they are going to settle the case with the Government for the proper remedy or to pay the costs of the remedy.

If you remove joint and several liability, the likely fallback position is to say that the Government will have to establish individually your connection to the site and negotiate that with you. There are several problems that that presents us with.

It changes who bears the burden of the transaction costs. Quite frankly, right now, the burden of organizing, getting together, and making an apportionment resides with the responsible parties. The Government is interested in the final, bottom line submission from that group of parties.

If each of the parties is to come forward and say I want to talk about my share at a site, it requires the Government to identify that share, attempt to negotiate it, get into questions about does it constitute 5 or 10 percent. When you are talking about a several million dollar cleanup, that is a sizable amount of difference in the final contribution. When you have a large number of parties, as we do at some sites, 100, 200, 300, I am talking about a system that is almost unmanageable. You don't have a mechanism outside of joint and several liability to make the parties come together.

What joint and several is doing when the parties meet is that the people, particularly those who have been through the process several times before, say the Government has the potential to sue us all. We need to talk about how we are going to approach them.

Quite frankly, joint and several liability has eliminated most discussion in the settlement about who is liable. The real discussion in the settlement process now is what should the remedy be and is it reasonable.

What we are saying is, if you remove joint and several liability as the standard which we can use, you not only impair the negotiation process, but you will shift the discussion, shift the burden to the Government to deal with liability as a part of that negotiation.

Senator MITCHELL. Am I fair in restating or summarizing your views in this fashion, that now the existence of the possibility of liability for the total sum creates an incentive on each individual party to negotiate an apportionment among themselves short of a trial?

Mr. LUCERO. Yes, sir.

Senator MITCHELL. And that absent the principle of joint and several liability, there would be no incentive and, in fact, there would be no incentive to do that and the opposite incentive would exist that most defendants would then say to the Government, you prove my share, which would inevitably lead to more trials than is now the case?

Mr. LUCERO. That is our conclusion, as well.

Senator STAFFORD. If the Senator would yield, I think it would mean that most defendants would say, John Doe did it; I had nothing to do with it.

Senator MITCHELL. So, can we then say that your answer to the insurance industry, and I am going to ask them the opposite questions when they come here in a few minutes, is that the removal of joint and several liability would in fact slow down the process and result in more trials and less expeditious handling of cases?

Mr. LUCERO. Yes, sir; and if I could just go a step further, it is our view, listening to the insurance industry, as we have spent a great deal of time doing, that the reason they would like joint and several removed is not to expedite the process, but to basically reduce their potential liability, which has been greatly expanded through a series of various interpretations of their contracts. Right now, they have a very broad liability, and they are very much involved in these cases through their duty to defend. What happens if you shift onto the Government a slowdown process, there is less liability that they have to deal with, fewer cases, a slower process.

Senator MITCHELL. Well of course, it is understandable that they are acting in accordance with what they perceive to be their economic interest. They want to reduce their liability and that is not surprising. Our whole economic system is based in the principle that people act out of their economic interest. So, I am glad you said that.

Let me ask you, though, on the other hand, do you not agree that if representatives of the insurance industry come here and say, as they will, that they can't write insurance in this field and they are not going to write insurance in this field, that it poses a very serious problem to the whole operation of the cleanup and disposal system as it now exists under these laws and a problem with which we must deal?

Mr. HABICHT. Well, I was going to say something about the prior question as well as this one, Senator.

Senator MITCHELL. Go ahead, Mr. Habicht, if you want to.

Mr. HABICHT. First of all, with regard to your second question, of course that issue is important. I think the facts that underlie the assertions, both as they relate to writing future policies and to the scope of potential liability and the devastating nature of that for retroactive liability, are important things for the public to be aware of and to be fleshed out in a responsible way.

I was going to add a point on joint and several liability. Not only is it a rule which is not absolute and set in concrete in its application, but it also assumes that the harm cannot be apportioned—that these people contributed to the harm unless it can be apportioned with reasonable certainty. And the way EPA approaches these sites and the need to move quickly is because they have to clean up the whole site unless parts of it can be segregated and it can be said, well, this part is not dangerous to the public health; we don't have to clean this part up. If that can be done, then that is a different story and joint and several wouldn't apply to those people who contributed to the segregable, nonharmful parts. But when it was all mixed together at a time when people weren't aware of the hazard, the Government generally has to come in and clean up the whole thing.

Certainly, I think, for the Government to have to try to unscramble the eggs and prove each individual's participation is adding an issue for litigation that will certainly increase the time and may decrease the effectiveness of Superfund enforcement. But as I said, we are interested in hearing additional viewpoints, as well.

Senator MITCHELL. Well, you see, the problem we have is that this is a very difficult and complicated area, one of many with which we must deal. We want the program to proceed rapidly and as fairly and efficiently as possible. I think everybody shares those goals.

The insurance industry takes the position that this standard has the opposite effect, that it slows down the process, that it adds to the expense, and the phrase used is "transactional expense," legal fees as opposed to cleaning things up. What I gather is that you are saying just the opposite is true, that removal of that standard would, in fact, cause further delay and additional expense.

It makes it difficult for us to evaluate it, but I want to make it clear that we have here a very sharp difference of opinion on the potential results of either retaining or eliminating the joint and several liability standard. I am clear, am I not, in the position of both of you is that if we adopted the insurance industry's recommendation to eliminate that, it would not speed up the process but, in fact, would slow it down and would not reduce transactional expense but would, in fact, increase it?

Mr. HABICHT. Mr. Lucero can speak for himself, and this is obviously a critical point. Enforcement under Superfund involves two basic issues. One is the scope of the remedy, and the other is the liability of the parties.

We are working, as I have indicated, to streamline the process. On the remedy issue, EPA is working on having a public administrative record process that will move along and involve the public at the early stages of remedy selection so that ultimate litigation over remedy will be more streamlined. In enforcement of liability, the joint and several liability rule is an incentive outside of court, as Mr. Lucero and I have indicated, for private parties to help the Government in getting everybody together and reaching a settlement more quickly that will ultimately involve a substantial portion of the problem being paid for by people roughly in relation to their actual contributions.

Senator MITCHELL. I gather that is a yes answer.

Mr. HABICHT. That is correct. It is a yes answer, but it is sort of a lengthy question. But on the last point, just looking at it in a fairly straightforward way, if you add the requirement that each individual share must be determined, you are adding an additional issue to be resolved through litigation.

Senator MITCHELL. Let me ask this last question, and then I will defer.

I might also say that on the fairness question, what you are saying is that however unfair the principle of joint and several liability may appear in theory, that is the ultimate possibility of imposing 100 percent liability on someone who caused 1 percent of the problem, that in fact it does not work that way, and therefore the benefits that the rule provides outweigh the theoretical disadvantages which do not occur in actual circumstances. Is that a fair statement of your position?

Mr. LUCERO. Yes, sir.

Senator MITCHELL. Mr. Lucero?

Mr. LUCERO. Yes, and I would like to add a point that I think is important. Removing joint and several liability as a standard will not reduce the insurance industry's potential liability if that liability can be established through any alternative mechanism, a negligence standard for example. They still have the liability problem that has been created by the ambiguities in their own contracts over the last almost two decades. That is very important.

Second——

Senator MITCHELL. Well, it will not reduce it in the aggregate amount, but it will reduce the risk with respect to a single insurer insuring a single insured, contractor or operator or otherwise.

Mr. LUCERO. Yes, that I agree with.

The other point that I would like to make—I think it is important to keep in mind that by our count 22 States presently have some form of a liability standard, in addition to the CERCLA standard, that is very similar, a strict joint and several liability. Removing that in the Federal Government's statute doesn't necessarily eliminate that problem.

Senator MITCHELL. No, but the trend is the other way, isn't is, Mr. Lucero? Many States are not recognizing that there is something unfair about tagging one guy with 100 percent of the responsibility when he caused 5 percent of the problem, and they are changing it to apportionment, are they not, in ordinary negligence cases, let's say?

Mr. LUCERO. Actually, I would say it is split, but I can't give you an actual count.

Then, the last point I would like to make in response to the question you asked a minute or two ago was that not all insurance has stopped. There are a limited number of companies that are still writing pollution related insurance, and there is the Insurance Services Office, which is a nonprofit organization associated with the insurance industry that is working on new contracts that could be considered in the pollution area.

We are led to believe by a number of people that the problem of future insurance, meeting the future insurance needs, can be worked out. No one is quite sure just how broad a coverage that might be, how expensive it will be, and what the contract language is, but we are willing to work with the insurance industry to talk about what they think they can do, what is necessary, and what other adjustments can be made. It is not as though the problem created in the past, which is clearly accentuated by a strict joint and several liability standard, can't be avoided in the future and the benefits of insurance, which I think we all need, be provided.

Senator MITCHELL. Thank you.

Mr. Chairman, I apologize for going over whatever time we have had.

Senator **Stafford**. I think the questions you have asked have really been very helpful to the committee in understanding the problem.

Senator Domenici, what we have done is place opening statements for those who wish it in the record, although if you have one you would like to make, we will take it during this first round of questions, we have placed no limit on time. We are going to have to place a limit on time, if my colleagues agree to it, after this round, but this would be an appropriate time for you to ask questions if you have them.

Senator **Domenici**. Thank you, Mr. Chairman. I won't, at least based upon what I presently understand, I won't ask very many questions. Perhaps I will learn something and be able to ask more.

How did the joint and several liability issue focus? Where did it come from? Is it common law or did we create it in the act that we are reauthorizing on the floor?

Mr. **Habicht**. I would say briefly that the courts that have reviewed the issue have determined in the cases that joint and several liability is part of the congressional scheme.

Senator **Domenici**. What does that mean?

Mr. **Habicht**. Well, looking at the language of the statute, the legislative history, and the purpose of the scheme, as well as the common law rules concerning imposition of joint and several liability, the courts determined that there was a congressional intent of——

Senator **Domenici**. So, according to interpretation, we created that?

Mr. **Habicht**. Yes.

Senator **Domenici**. When?

Mr. **Habicht**. In 1980, in enacting the Superfund law.

Senator **Domenici**. Is it explicit?

Mr. **Habicht**. I might just add, Senator, that under section 311 of the Clean Water Act, which is, at least, an analogous kind of scheme, joint and several liability has been found to have been imposed by Congress since the enactment of section 311 which predated 1980.

Senator **Domenici**. I understand that, but in section 311 of the Clean Water Act, it is explicit. Is that not right? There is nothing that explicit in the act that we passed. Or is it not explicit in section 311?

Mr. **Habicht**. I don't believe that it is explicit in section 311, either.

Senator **Domenici**. All right. So, basically, if I understand, one of the issues that we have, since it took a court to interpret what we had in mind, it might be interesting if we would just decide what we had in mind. Is that kind of what this hearing is about?

Mr. **Habicht**. Senator, given the issues that we deal with, particularly in my area at the Justice Department, it is frequently the case that the courts have to fill in gaps, and it is certainly more desirable for Congress to address the issues directly.

Senator **Domenici**. So, there isn't anything explicit that creates the problem that is before us. It is an interpretation of what we had in mind, the judicial branch of Government, that has created the joint and several liability issue that we are discussing.

Mr. HABICHT. Right, but once interpreted by the courts, that is the law of the land.

Senator DOMENICI. Yes, I understand. I have been here a little while and I am a lawyer, also. I understand. Common law is the law whether we put it in there or not, but we can change it, can't we?

Mr. HABICHT. Yes, sir, absolutely, Senator.

Senator DOMENICI. Let me ask each of you, do you recommend that we leave it like it is, clarify it, or change it?

Mr. HABICHT. I will just briefly say that we have proposed amendments that build on the legal structure that has been created that would retain the essential liability scheme and add some rules that would provide more incentives and more ability for private parties to settle, to resolve these cases voluntarily. So, generally, it would be to retain what has already been built over the last few years.

Senator DOMENICI. How about you?

Mr. LUCERO. I would agree, Senator. I would just reiterate something that Mr. Habicht said earlier. One thing I would like to point out is that for the purposes of the Superfund law, that is, to get expeditious cleanup, we are seeing dramatic increases in the number of settlements. For example, in 1984, the total number of settlements, which included administrative and judicial settlements, using the principles of strict joint and several liability, equaled what we had achieved in all future years. And, to date, over the 5 years that we have been administering the Superfund Program, we have had 170 settlements. That is work started, some phase, or total cleanup at those sites.

The commitments that have been made there total, by our calculation, which we think is a conservative estimation, almost 330 million dollars' worth of commitment. That is close to what has already been committed in actual cleanup work, cleanup work as opposed to studies and other activities, on the fund-financed part of the program. We think it is very effective. We think it is very cost effective, and we would want to build on it.

There are a couple of areas, as Mr. Habicht said, where we think we can build on the process and make it even more streamlined, and we have proposed those in the administration's amendments. Then, in addition, there are a couple of areas where Mr. Thomas and myself and others at different times have suggested that Congress could clarify whether they thought the Agency should consider certain other ideas. There are two that are not on the table that I would like just to leave you with, and we can talk with your staff or yourself in the future.

There are two areas that seem to really be holding up settlements in the eyes of the private parties at the moment. One of them is, they would like to know why the Superfund, in considering settlements, wouldn't look to paying the share of the parties that are not present.

Now, under strict joint and several liability, you can look to the parties to pick up the whole cost even if there is a party not available. We have in the past considered that. I, particularly, have been in a series of hearings where at least the House has made it very clear to us they don't wish to consider that, but a number of parties, private parties, have said repeatedly to us that this is—if we could deal with that issue more effectively, they think there would be more settlements. In our settlement policy, we have said that we will consider that in the appropriate case, and we are moving in that direction, but Congress' statement of intent would help in that area.

One other area that creates a great deal of concern for private parties to a settlement is who assumes the responsibility for redisposal of waste. Once there is a settlement, who remains liable if the remedy fails, if you take it to a RCRA facility and it fails there? The way we are interpreting what Congress intended is that Congress intended that the private parties stay responsible.

Again, a large number of private parties, through their attorneys and elsewhere, have come forward and said we think if the Government would assume some of that risk, you would get more settlements. Within the confines of a strict joint and several liability standard, while we still maintain that standard, that kind of flexibility may promote more settlement and streamline the process, reduce transaction costs, and allow us to move forward faster.

Senator **Domenici**. If you are accurate in assessing a joint and several liability, strict and joint and several, as promoting settlements, if you are accurate, there still remains the issue of whether the settlements by this legal type of coercion—there is nothing wrong with it; what you are saying is happening—it is still an issue of whether the settlements are proportionately fair in terms of the liability. Obviously, if they are jointly and severally liable, you get four people settling and the person who has a lot of insurance and a named big company, and they only have 1 percent of the responsibility, but you are coercing the settlement in a legal way and they may be paying far more than a proportionate share.

Do you have any information that sheds some light on that? We can get it from somebody else, I assume, who has been part of these things, but do you know?

Mr. **Habicht**. Senator, we would be happy to provide more detailed information. I think the settlements that have been reached, even before contribution, which we would like the Congress to confirm, as well as protection from contribution for settling parties—don't reflect payments by the settling parties dramatically out of proportion with their actual contributions.

Now, the issue of what is the factual contribution is a tough one, because it is not just volume; it is toxicity and mobility and other factors that make apportionment an imprecise science. But just looking at volume, our goal is to reach settlements with the vast majority of parties contributing, roughly in proportion to their contribution. We can focus on that, but again the right of contribution is also available to permit them to recover from other parties if it turns out that they did pay more than they believe that they should have paid.

It is very important in this discussion, when we are talking about existing law and so forth, to recognize that the Superfund situation is a unique one. It has analogues elsewhere, but it is a unique one in the sense of there is a job to do and it is going to cost a substantial amount of money, whoever ultimately pays. The question is not, do these people pay or does nobody pay? Somebody is going to have to pay, and that is part of the underlying view of the program.

But I think in implementing it, it has to minimize litigation costs. That is an important issue for Congress to address. It also has to be fair in a fundamental fairness sense. And these things are important to us. We have looked at this and how we implement it and how we think the courts will let us implement it and, at least, given the alternatives that we have looked at, we think that it is a way of making the enforcement scheme, in this unique context, one that is more efficient and fair and will not impose liability grossly out of proportion with someone's individual contribution.

Senator DOMENICI. I have a number more, but I will yield at this point, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Domenici.

Senator MITCHELL. Could I have just one more question, Mr. Chairman?

Senator STAFFORD. Yes, Senator Mitchell, one more question.

Senator MITCHELL. Because it is a question that Senator Domenici explored and Mr. Habicht commented on briefly, but on the issue of contribution and fairness, the insurance industry has objected to the amendment dealing with contribution which this committee adopted recently at the request of the administration. They contend that this provision prohibits one party from impleading another, and that that is contradictory to existing Federal rules of civil procedure.

The first sentence of the amendment appears to substantiate their view, and I would like to just read the one sentence and ask you if what they say is true and if not, what is the response to it. It says,

> In a civil or administrative action under this section or section 106, no claim for contribution or indemnification may be brought until after entry of judgment or date of settlement in good faith.

That seems to suggest that if you sue one party, he cannot, until either after the case has been settled or judgment has been entered, seek to bring in another party which may be equally or even more responsible. Is that true and, if not, what is the explanation of this?

Mr. HABICHT. Just briefly, Senator, I think our goal is to have a manageable number of parties litigating the basic issue of remedy and so forth. Our goal in the amendment was not to force parties absolutely to sit on their hands until all the litigation was done, but rather to ensure that the case in chief be litigated, actually be tried first. We did not intend that the parties would not be able to use the process to bring in the other parties. It is just that if you allow all these other parties and all these third-party claims all to be litigated all in one lump at one time, it will slow down the basic litigation of the Government's case in chief.

But this issue has been raised to us, and we are certainly going to take a look at the wording, whether or not there may be a way, while making clear that the Government's case against the named principal defendants proceeds first, of not unduly——

Senator **Mitchell**. Your objective is laudable, but the fact is you have just confirmed that is the effect, isn't it? That if the Government sees 5 or 500 parties that they feel may be responsible and sues 1 of them or 2 of them or something less than the total, those who are sued cannot, under this amendment, could not seek to bring into the process others who are equally or may be more responsible in their judgment until after the case has been tried and judgment entered.

Mr. **Lucero**. That is, Senator, the way the language reads. It has been pointed out to us that, in fact, that may work against being able to build a settlement if people think they can hang out and not get sued for a very long period of time. Recognizing that that was an unintended result, we have said that we may need to look at how that language is actually written. We still would like to respect the right of contribution, but as to the timing issue that you have raised, we think that may be an issue that we should go back and look at.

Senator **Mitchell**. Also, in terms of transaction expense, this forces the defendant who has been sued not to go through two trials.

Mr. **Lucero**. That is right.

Senator **Mitchell**. The first case he tries on the question of liability, and then, if he loses to the Government, now he has to go sue 200 or 300 or 400 other people and bring them in and say they are responsible and prove their responsibility. So, if your objective is to speed up the process and reduce transaction expense, wholly apart from the question of fairness, it seems to me this could produce an opposite result.

Mr. **Habicht**. What this does, Senator, that is absolutely correct, and that is the kind of issue that Congress needs to focus on, but the goal is to provide parties a day in court. It may be a separate trial, which is not anything that people like as a general proposition, but the goal is to provide all the incentives and tools, administratively and through the statute, for them never to reach that trial, for them to recognize that we all have a common interest in getting together and getting on with the cleanup without having litigation with hundreds of parties.

Senator **Mitchell**. I think you should relook this section, though.

Thank you, Mr. Chairman.

Senator **Stafford**. Thank you very much, Senator Mitchell.

We have now been joined by the ranking member of the committee, Senator Bentsen, who was detained in the Finance Committee all morning. Senator, if you have any opening statement, I have reserved space for it immediately following mine. If you have any questions, this would be an appropriate time.

Senator **Bentsen**. I would understand that to mean that they have been putting them in the record, and I will join in that, Mr. Chairman.

Senator **Stafford**. That is true.

Senator **Bentsen**. I would be delighted.

Senator **Stafford**. All right.

Senator **Bentsen**. The question I would like to ask is, If the insurance situation continues unchanged, what do you believe would be the effect on RCRA facilities that must meet the financial responsibility requirements by November 8, 1985, or lose their status for protection? What do you think would be the result?

Mr. LUCERO. Senator, I probably should answer that question. As you probably recall, in the RCRA amendments there was a provision that requires that all facilities subject to ground water monitoring requirements and financial responsibility requirements must certify on November 8, 1985, that they are in full compliance with the regulatory requirements.

Senator BENTSEN. That is why the question was asked.

Mr. LUCERO. That is right.

Right now, there are essentially two basic ways that companies can establish financial responsibility, either by meeting a financial test, in other words self-insuring, or, if they have insufficient resources to be able to meet that test, in most cases they will look to an insurance policy to meet that basic requirement.

The problem that a number of facilities are running into and one which we are concerned about is that they are saying it is very difficult for them to get the types of insurance that the regulation requires. By November 8, 1985, there is some problem that the parties won't be able to certify because they will not be able to get insurance.

We are looking at that problem. As I said earlier, before you joined the panel, we are trying to work with the insurance industry to see if there is a fix to that, and we are looking at other options that might be available as to how we interpret that particular statutory provision. But if it were applied literally across the board at the moment, there would be a large number of firms, particularly small- or medium-sized firms, that could not certify compliance and would lose their status.

Senator BENTSEN. What we were trying to limit, of course, was to try to get rid of some unqualified firms or some of them that were financially unsound. But with the situation now in insurance, it won't be limited to the exclusion of those. You say you are looking at it. Do you have any idea as to what you would bring about in the way of change in the requirements to try to still achieve the objectives and yet qualify them? You say you are looking at it. Do you have any ideas you want to give us?

Mr. LUCERO. The best solution, of course, and we would like the private market to take care of the problem, and if we can work with them——

Senator BENTSEN. So do I.

Mr. LUCERO. That would be our preferred approach. We are looking at the possibility of compliance orders for firms who have made good faith efforts to obtain insurance. If they are under a compliance order making a good faith effort but not succeeding in finding insurance, we may—it is one possibility we are considering although we haven't concluded it is the right one—if they are under a compliance order, be able to certify.

Another—and these are all sort of getting more drastic as you go along—another possibility which we are not recommending at this time, in fact, that we are resisting, but I would mention it to tell you it is available, is to suspend the rule that requires financial responsibility in that way.

Obviously, we think that the requirement is very important, because, as you said, it was to get rid of those companies that really shouldn't be participating, which are too marginal; they are not capable of meeting their responsibilities. The insurance industry is performing a function of regulation that is supplemental to the Federal and State governments. If that is not available, that presents us with problems, and we may have to look at other alternatives.

Senator BENTSEN. Mr. Chairman, I may submit additional questions.

Senator STAFFORD. Thank you very much, Senator Bentsen.

I would say to my colleagues that we have eight witnesses to go, and it is going to be difficult. We do wish to finish this today even if we have to run through into the noon hour.

I particularly want to thank Mr. Habicht and Mr. Lucero. I think you have contributed materially to the understanding of the problem that the committee is facing, and you have done it at the right time before we hear the witnesses from the insurance industry and other affected people. So, for the committee, I express our very deep appreciation to you.

Mr. HABICHT. Thank you.

Mr. LUCERO. Thank you.

Senator DOMENICI. Mr. Chairman, could I ask a question? Excuse me.

Senator STAFFORD. Yes, sure.

Senator DOMENICI. The witnesses, in response to one of my questions, indicated that they had two suggestions which they felt should be considered with reference to liability after the settlement for events that would occur later, and some prospect of having the Superfund pay some proportion, if I understood correctly, in a settlement of the liability that they could genuinely say shouldn't all fall on those who were settling, if I understood them correctly. Is the staff aware of those? Have they submitted those suggestions to us in writing at any time, Mr. Chairman?

Senator STAFFORD. I think I would have to address that to a member of the staff who is here with us.

I am told we have not received that.

Senator DOMENICI. I wonder if it would be in order, Mr. Chairman, to ask them to submit their recommendations with an explanation.

Senator STAFFORD. I think it would be and I would make that request right now and request that it be complied with as expeditiously as can be.

Senator DOMENICI. Thank you, Mr. Chairman.

Senator STAFFORD. Thank you.

Are there any other questions? [No response.]

If not, gentlemen, we thank you very much.

Mr. HABICHT. Thank you.

Mr. LUCERO. Thank you.

Senator STAFFORD. The next witness will be Thomas Jorling, professor and director, Center for Environmental Studies, Williams College, and, I will say, no stranger to this committee. We will welcome you back, remembering your association here with a great deal of pleasure. We apologize for having to ask you to stick within the 5 minutes if you can.

STATEMENT OF THOMAS C. JORLING, PROFESSOR OF ENVIRONMENTAL STUDIES AND DIRECTOR, CENTER FOR ENVIRONMENTAL STUDIES, WILLIAMS COLLEGE

Mr. JORLING. Thank you, Mr. Chairman and members of the committee. My statement is very brief, and I think I can go through it within the 5 minutes alloted.

I have a sense that I am some mustard between two slices of bread, and I can't help but feel that one side might taste a bitterness which the other one might not.

My name is Tom Jorling. I am presently professor of environmental studies at Williams College in Williamstown, MA. I appreciate the opportunity to appear before you today in your continuing review of Superfund looking toward reauthorization.

Mr. Chairman, my interest and involvement in Superfund go back to its very roots in this committee. Specifically, I served under ranking member, Senator John Sherman Cooper, as minority counsel to the committee when the oil spill liability provision was first enacted in the Water Quality Improvement Act of 1970.

That provision, as amended in 1972 to add a hazardous substance spill provision and to become section 311 of the Clean Water Act provides the basic framework of Superfund, specifically the notice, response, and liability provisions. Many issues, especially insurance and insurability, were before the committee then as they are before the committee today.

My personal involvement with the program continued in a different form in 1977 when I became Assistant Administrator of EPA and assumed responsibility for program implementation. You will recall that this committee initiated a crucial clarifying amendment to section 311 to overcome a court imposed injunction which made possible full implementation of the hazardous spill provisions. During 1978 and 1979, I was also the responsible official in the Carter administration for the development and submission of Superfund legislation which would not have been enacted in 1980 without your personal leadership and the bipartisan support in this committee.

Today, I am not representing any organization or group. I am testifying at the request of the committee to share my views on insurance issues as they have been shaped by my experience with oil and hazardous substance liability.

Mr. Chairman, as public policy evolves and laws are enacted to establish liability on the part of owners and operators in any area, questions of insurance are raised. In 1969, many witnesses spoke to this issue. Some suggested Congress should not enact oil spill liability legislation because insurance equal to that liability would not be available.

This committee knows well that new departures in public law and policy are often met with instinctive negative responses. It is the nature of the legislative process to try to accommodate the legitimate concerns of those respondents as the committee did in 1970 with respect to liability and certificates of financial responsibility. And the record shows, Mr. Chairman, that after a period of adjustment and experience, the insurance industry and the insured parties adjusted to that new policy and associated requirements.

It is important to focus on the essence of the purpose of the scheme of liability that was first enacted in 1970 and carried over into Superfund in 1980. Its purpose was not primarily to provide a method for the Government to recover the costs of cleanup of the environment, although it does serve that purpose. Rather, establishment of strict liability was intended to provide an incentive to induce the highest standard of care in the management of oil and hazardous materials by those who control them. That is, its purpose is to cause those in control of the substances to take whatever actions are necessary to prevent releases into the environment.

Insurance plays an important role in this program. Insurance plays that role best when the insurance companies establish conditions of their coverage which force that same high standard of care on the insured. The basic difference is that, given the specificity of the contract, the insurance companies can translate that public policy into precise contractual terms.

Clearly, any insurance scheme which insulates an owner or operator from that high standard of care should either be costly or unavailable, preferably the latter. And, of course, if insurance is asserted not to be available, the charge is made that the scheme of liability is uninsurable.

If these activities are so inherently risky as to make them uninsurable, then perhaps then marketplace is making a judgment that the activity should not be pursued. Others may suggest, as you may be hearing now, that Government must provide insurance or the liability must be modified. Mr. Chairman, experience suggests that neither of these is necessary. With respect to oil pollution and other environmental pollution, the insurance companies and the insureds apparently are able to correlate standards of care, risks, and premiums within the framework of doing business.

Union Carbide's recent reactivation of the Institute, WV, plant would indicate their judgment regarding the insurability of even a risk involving methylisocyanate.

I perceive in many of today's assertions a sound similar to that of 1969 and ~~1977 and~~ 1980, and that sound simply and plainly put is, at this window of opportunity in the legislative process, let's try to get the public to bear some of our costs. Simply put, wolf has been cried before, and I can sympathize with that. Any good business person attempts to reduce costs, and one way of reducing costs is to transfer them to some other party.

I think the record shows, Mr. Chairman, that steadfast public policy, as in the case of section 311 with oil and hazardous spills, Superfund and RCRA, along with aggressive implementation and enforcement, will lead to adjustment and the argument of uninsurability will subside. The market will respond, or the public will not be faced with inherently risky activities because insurance is not available. More importantly, by their actions in providing coverage to these risks, insurance companies will help in assuring high standards of care, a most appropriate and effective result.

Requests have been made to have the Government become an insurer or a reinsurer of liability for release of hazardous substances to the environment. Those proposals should be particularly resisted. The responsibility of Government is to protect the health and welfare. If it also assumes ultimate liability, there will be inherent and irreconcilable conflicts within the Government. Given the overriding concern for budget deficits, this conflict undoubtedly would be resolved in favor of economics with public health protection getting short shrift. The Federal Government need not, and should not, be put in such a position.

Mr. Chairman, if evidence firmly establishes that any particular or specific activity is, after the test of the marketplace, uninsurable, the response isn't to subsidize such activity with either environmental degradation, public health, or taxpayer resources. The appropriate response is to focus on and address the activity itself. Once Congress affirms its decision, the insurance industry and the insureds go about the business of making it work. I don't think there is anything before this committee now that suggests the current situation is any different.

Bhopal should cause us all to redouble our efforts to see that the highest standards of care are applied across all activities that can result in the release of chemicals. RCRA, Superfund, and its companion program in section 311, are important elements in that effort. Congress should take no steps, especially in the wake of Bhopal, to relax or erode them.

Thank you, Mr. Chairman. I would be happy to answer questions for you or other members of the committee.

Senator STAFFORD. Thank you very much, Mr. Jorling.

You were a member of this committee staff during the time that several of the financial responsibility requirements contained in existing law were enacted. You then served at the Environmental Protection Agency where you implemented some of these requirements. Was insurance available at the time those requirements went into force, or did the market develop in response to the law's demand? Finally, did you observe any attrition which would be attributed exclusively to the financial responsibility requirements?

Mr. JORLING. Mr. Chairman, at the time the Water Quality Improvement Act was enacted in 1970, there were protestations that insurance was not available. I think the record will show that some insurance was available at the time to cover those risks and that, after enactment, insurance became widely available to cover those risks. I think if there was any attrition in any of the sectors responsible for at that time managing oil and, later, in 1978, for managing hazardous substances, it was not singly attributable to insurance or lack of insurance. Rather, it was a combination of factors and some people determined that it was not in their best interest to engage in that business for a number of reasons.

So, I don't think that insurance or insurability has ever been a single isolated factor which has caused attrition.

Senator STAFFORD. Thank you very much. I am glad to see a member of the faculty from a sister school down here in Washington.

Mr. JORLING. Thank you, sir.

Senator STAFFORD. Senator Bentsen?

Senator **Bentsen**. Mr. Chairman, I have no questions other than to say I am delighted to see Mr. Jorling back before us. He is a very able and distinguished former member of this staff.

Mr. **Jorling**. Thank you, Senator.

Senator **Stafford**. Thank you. I was about to say he reflects great credit on Williams College, and I hope that I will be able to say something like that about another alumnus who is now down in Washington.

Mr. **Jorling**. I won't enter that fray. I know specifically who you are referring to.

Senator **Stafford**. Senator Burdick?

Senator **Burdick**. No questions, Mr. Chairman.

Senator **Stafford**. Senator Symms?

Senator **Symms**. No questions, Mr. Chairman.

Senator **Stafford**. Senator Mitchell?

Senator **Mitchell**. I have one question, Mr. Chairman, if I might.

Mr. Jorling, in your statement you said that a steadfast public policy will lead to adjustment and the argument of insurability will subside, the market will respond, or the public will not be faced with inherently risky activities because insurance is not available.

We, of course, don't know whether wolf is being cried again or whether there really is the crisis that has been suggested by some, but the problem is that when you say the public won't be faced with these activities, the problem is that we already have got thousands of sites with hazardous waste that we are trying to clean up. Actually, the bill that we are dealing with, Superfund, is directed to the cleanup of existing sites. RCRA and the permitting of—older sites I am talking about—the RCRA law deals with permitting and operation now for the disposal of these things.

So, if insurance isn't available, we are still left with this terrific problem. What do we do with this? Every year, the numbers we get go up, thousands and thousands go up, and the potential cost goes up. So, I am not sure that statement is directly appropriate under these circumstances.

Could you comment on that?

Mr. **Jorling**. Yes, Senator. You have identified the fact that that is a generic statement, and the clarification of these issues requires some degree of specificity. There are many different actions under these various statutes which are covered and for which insurance is appropriate. The language of my prepared remarks speaks most specifically to the spills or releases into the environment that are covered under section 311 or Superfund. It, however, needs further clarification with respect to the other two categories of activities. One is the response to waste sites that accumulate over a number of decades, and the second issue is the one that was the subject of the final discussion with the EPA witnesses, and that is whether or not RCRA permitted sites can be insured.

Let me address the second one first. My judgment is that if the insurance industry is saying that RCRA permitted sites cannot be insured, what they are in effect saying, if we cut away the rhetoric, is that they have identified some specific elements of the EPA regulations which establish performance, design, and operating standards for a RCRA permitted site, that they have identified some specific elements or gaps in those regulations with the effect that there is a risk which they think is extant which cannot be insured.

I think they should bring to this committee evidence that the EPA regulations are not satisfactory to protect public health and welfare and, therefore, not insurable. Until you get that level of specificity, I tend to believe that my characterization found in my statement of the claim of uninsurability is accurate.

The tougher problem comes with the issue of how do you allocate financial responsibility with respect to those who contributed to dumpsites that have been accumulating over a number of decades. I would simply say there that I subscribe to the testimony that the EPA witnesses just gave, and that is the framework of liability that is in the statute appropriately reverses or transfers the burden of proof to those who do have the knowledge or should have the knowledge of what materials went to those sites and that it is in their best interest to negotiate among themselves and come forward with a settlement. That is the most appropriate way of solving that problem in the public interest.

With respect to some litigation that the insurance industry has pointed to, there are cases that have come down on both sides, some favorable to the insurance industry, some not favorable. There are cases which are pending in many courts, State courts and Federal courts, at various levels. I think it is simply premature to have Congress address a public policy response given the very unsettled state of what is basically contract law, where terms of contracts freely and willingly entered into by private parties are being interpreted by the courts. Until there is settled law in that area I don't think it is appropriate for Congress to respond.

Senator MITCHELL. Thank you.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Mitchell.

Senator Domenici?

Senator DOMENICI. Just take your last statement, generally I wouldn't disagree unless there is something that we, in the passage of the law 4 years ago, wrote into the law that changed the liability in terms of what it was before for past acts. I think the statement that you just made does not necessarily apply. That is something for us to look at and not something to wait around for interpretation.

Mr. JORLING. The cases that I referred to are interpretations of words that are contained in contracts and unaffected by the language that was included in the 1980 Superfund legislation, or in RCRA.

Senator DOMENICI. Right, but if there are others, then it is appropriate for us to look at it. If it is not an interpretation but rather an interpretation based upon something we passed or some implication in the law that we passed, then we ought to be looking at it because we changed the playing field even as to contracts. Is that not correct? We could have.

Mr. JORLING. To the extent that Congress has acted in a manner that after implementation and periods of adjustment is determined to be working to a negative effect in public policy, then certainly it should be revisited.

Senator DOMENICI. In your general explanation of keeping the pressure on, as you describe the law and the history of the law with reference to oil spills and the like, I heard you say that we were forcing and pressuring the industry so that they would be ever more careful with reference to those kinds of activities. Oil spill was your specific one. I don't think anybody disagrees. You did not include in that statement of purpose as you interpreted the action that you participated in to be retroactive. You were talking about standards in the future which you were forcing on them as this body of law evolved.

Did I read you right?

Mr. JORLING. In the distinction I tried to make in response to Senator Mitchell's question, yes. With respect to future and—well, let me change that—current and future management of chemicals, both chemicals that might be released to the environment, as well as those which are being managed under RCRA, the inducement of the highest standard of care is the appropriate public policy.

The other side of Superfund attempts to transfer to those who have the knowledge or should have the knowledge the basic burden of resolution. I think that is an appropriate transfer and it is the transfer that results from the framework of liability in Superfund.

Senator DOMENICI. I understand. Thank you very much.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Domenici.

And thank you very much, Mr. Jorling, for coming down here and helping us.

Mr. JORLING. Thank you, Senator.

Senator STAFFORD. The next witness will be Mr. Lawrence Jones, president of the American Insurance Association.

Mr. Jones, I understand you have several people accompanying you. I apologize in advance for this, but as we said, Mr. Jones, you and your panel will have a cumulative total of 10 minutes to use as you may see fit.

STATEMENT OF T. LAWRENCE JONES, PRESIDENT, AMERICAN INSURANCE ASSOCIATION, ACCOMPANIED BY WHEELER HESS, SENIOR VICE PRESIDENT, TRAVELERS INSURANCE CO.; JOHN BUTLER III, DIRECTOR, PUTNAM, HAYES & BARTLETT, INC.; GEORGE BERNSTEIN, ATTORNEY, AMERICAN INSURANCE ASSOCIATION; RICHARD SCHMALZ, ATTORNEY, AMERICAN INSURANCE ASSOCIATION; AND DENNIS CONNOLLY, VICE PRESIDENT, AMERICAN INSURANCE ASSOCIATION FOR LIABILITY

Mr. JONES. This we understand, Mr. Chairman. And I want to say that I regret very much that our principal witness, the one who was going to be our principal spokesman had to leave. We made every effort to inform your office and inform the committee that Mr. William O. Bailey, president of the Aetna Life & Casualty, had to be in New York as required by another Federal statute to appear in connection with a stock issue, a securities issue that they are making, the securities law requiring him to be present. We regret that very much because his company is one of the principal writers of insurance in this field and he had determined that his company can no longer write in that field. You would have benefited greatly if you had had his comments.

With me are Mr. Wheeler Hess, senior vice president of the Travelers Insurance Cos.; Mr. George K. Bernstein, a former Federal insurance administrator and first deputy superintendent of insurance for the State of New York and a long-time consultant of the AIA; Mr. Richard A. Schmalz, former general counsel of the Hartford Insurance Group and a consultant to AIA; Mr. John C. Butler of the firm of Putnam, Hayes & Bartlett, Inc., who has been retained by the American Insurance Association to develop the litigation costs and delay associated with the Superfund program. We have also asked Mr. Dennis Connolly, vice president of the American Insurance Association for Liability, to appear to be able to answer questions.

Senator **BENTSEN**. Mr. Chairman, I ask unanimous consent that the statement of Mr. Bailey that Mr. Jones has referred to be entered into the record.

Mr. **JONES**. Sir, Mr. Bernstein, Mr. Schmalz, Mr. Butler have supplemental statements to Mr. Bailey's statement which we would like too, as supplements. They develop different points of the insurance problem.

Senator **BENTSEN**. I am not arguing that. Fine.

Mr. **JONES**. And if we could have those included as well as the statement of the association.

Senator **STAFFORD**. We will put them all in the record.[1]

Mr. **JONES**. I want to claim the privilege of reading Mr. Bailey's statement. He was going to be the primary spokesman, and in view of the fact that he speaks in part for the American Insurance Association and in part for his own company, the Aetna Life & Casualty, I think it would be unfair for me to summarize or characterize his statement. In view of the fact he can't be here to do that, I would like to read his statement if I may. It addresses the problems that have been raised.

My name is William O. Bailey. I am president of Aetna Life & Casualty and the immediate past chairman of the American Insurance Association. AIA's member companies collectively write the overwhelming majority of the commercial general liability insurance that is the focus of this hearing. We appreciate the opportunity to be here.

The insurance industry's ability to provide a market for current and future environmental liability insurance has been crippled by legislative and judicial decisions that dramatically affect the liability of insurance companies under already issued policies which, in many cases, expired many years ago. The root cause of this is confluence of two events: responsible parties, found liable for cleanup under Superfund's expansive liability concepts, are seeking to shift those costs to insurers. This is happening at a time that recent court decisions have greatly expanded the scope of coverage of the liability insurance policies under which Superfund responsible parties are attempting to recover.

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[1] The statements referred to may be found beginning at p. 96.

If I accomplish nothing else today, I hope to make clear my belief that hazardous waste cleanup is a national problem of great complexity that cannot be resolved through retroactive determination of responsibility backed up by bad interpretations of insurance policies which place the ultimate burden on the insurance industry.

I would like to focus on three areas of concern: One, the unfairness and inefficiency of the current Superfund system with its undisputed potential for arbitrary imposition of liability and massive transaction costs or litigation expense;

Two, the effects of recent court decisions that these liabilities and transaction costs are covered by insurance policies despite policy language specifically excluding such coverage; and

Three, the question of whether the pollution exposures of cleanup contractors, generators, haulers, and site owners are insurable under the current system.

Beginning with the system itself, the Superfund Act has now been construed to provide joint, several, retroactive, and strict liability without even a need to demonstrate a causal connection between the acts of the defendant and the pollution in question. In addition to allowing recoveries for activities which were neither illegal, negligent, or even unreasonable at the time they took place, this construction permits, even encourages, selection of responsible parties based not on actual contribution to the pollution hazard, but rather on ability to pay. In fact, we have reached the point where we now have suits brought under Superfund against innocent parties to recover cleanup costs resulting from illegal dumping by others.

I refer you to a March 14 article of the New York Times describing a Superfund suit to recover the costs of cleaning up municipal landfills in New York City.

Although the major corporations that are defendants had paid to have their wastes delivered to certified sites, the haulers illegally bribed a city employee to allow disposal at landfills. The fact that the companies were unaware that their wastes were illegally redirected to city landfills is apparently considered irrelevant, with Mayor Koch quoted as saying, "Under Federal law, it is academic whether the companies knew or did not know that the toxic wastes they generated were being dumped illegally."

Is it any wonder that potential responsible parties feel compelled to defend this type of litigation vigorously and to bring other parties into the suits to share the cleanup liabilities? Consequently, we are now seeing suits in which there are literally hundreds of defendants and in which the cost of litigation will almost certainly exceed the costs of cleanup.

In order to better understand this problem, AIA commissioned the consulting firm of Putnam, Hayes, & Bartlett to investigate the magnitude of total Superfund litigation costs. That is one of the supplemental statements, Mr. Chairman. They have completed their report which is described in detail in our written submission. Their conclusions are startling. Based on the EPA estimates of an eventual national priority list of 1,800 sites, the studies conclude:

One, likely litigation costs range from $3.5 billion to $6.4 billion compared to the $14.6 billion in direct costs of cleanup;

Two, private party litigation costs account for 79 percent of the total costs, while Government costs and coverage litigation costs account for 15 percent and 6 percent respectively; and

Three, if two-thirds to three-quarters of Superfund transaction costs could be eliminated, then using the best estimates of litigation costs, 400 to 450 additional sites could be cleaned up at no additional costs to society.

Frankly, it is difficult to understand why, in the presence of analysis like this, we tolerate such waste and such neglect of injured parties and the society's concerns in the guise of civil justice. I submit that it is time to change this system and to get on with an expedited cleanup program.

The second area I want to discuss is the way some courts have interpreted or distorted policy language to find coverage for pollution losses where clearly none was intended. Until recently, we believed that we did not provide such coverage, but recent court decisions are now causing us to question that belief.

As this is discussed at some length in the written statement we have submitted, I will mention only the most egregious of a number of assaults on our policy language. Insurance companies writing general liability policies for commercial risks have, since the early 1970's, well before the enactment of Superfund, included a pollution exclusion in the policy. We have two supplemental statements that go into that at some length.

The standard industry exclusion provides that the policies did not apply to damages arising out of the releases of toxic chemicals, waste materials, or other irritants, contaminants, or pollutants unless the release was sudden and accidental. Not only does this language expressly exclude gradual pollution, but the gap in coverage resulting from the exclusion was filled by the creation of a new policy specifically covering gradual pollution, the environmental impairment liability policy. It is clear beyond reasonable doubt that the general liability policy with the standard pollution exclusion were not intended to and did not cover gradual leakage occurring over a period of time, yet many of the recent court decisions have, in fact, held that these policies did cover gradual pollution.

We believe, of course, that these decisions are wrong, and we will therefore continue to contest the issue on appeal and seek new jurisdictions to contest it. Nevertheless, based on our experience with the judicial system, there is a significant chance that we will continue to lose more of these cases than we win.

The effects of such judicial distortion of our policy language are substantial.

Senator STAFFORD. Mr. Jones, you have consumed 10 minutes. The Chair realizes you are at a disadvantage reading somebody else's statement and, in consequence, will extend the time for you another 5 minutes, but if you could summarize the statement in that time, we would appreciate it. And all of it will be made a part of the record in any event.

Mr. JONES. Let me go to 7 because this is where we offer some suggestions to the committee.

Let me now turn to the question of whether the environmental liability exposures of generators, haulers, site owner/operators, and cleanup contractors are insurable under the current Superfund system. Until recently, it appeared that the answer was yes as far as conventional liability coverage is concerned, that is, though companies had pollution exclusions in their general liability policies, they also developed and offered the separate environmental injury liability coverage specifically tailored to the hazardous waste exposure.

More recently, however, we realized that we cannot reasonably underwrite in this area because we cannot afford the likelihood that our insureds will become liable for cleanup costs, because the costs can be apportioned on an arbitrary basis pursuant to Superfund's expansive liability concepts; that not even Government can assess the overall liabilities in this area; that we cannot rely on our policy language in the courts; and we cannot effectively spread our risk through reinsurance, because the reinsurance market has made it clear in no uncertain terms that they will not provide coverage in the area.

Speaking for my own company, I simply cannot participate in this chaotic market nor, it appears, can other insurance companies. The market for environmental injury liability policies is decreasing significantly, with only a handful of companies now providing very limited coverage. Most, if not all, commercial writers are now considering the flat exclusion of pollution liability from their policies.

Nevertheless, I know and you know that essential insurance must be provided somehow. The answer, I believe, requires us to address two separate problems.

The first has to do with the fact that the current system potentially could impose such a substantial burden of the retroactive liabilities for cleanup on the insurance industry that we would have difficulty in servicing our normal market let alone the environmental liability market. A way to address this problem is contained in AIA's proposal which I am told each of you and your staffs have received. While we do not put it forth as a perfect solution or the only solution, it is structured to provide the relief we need with respect to retroactive liability to eliminate the excessive transaction costs associated with the current system and, most importantly, to expedite site cleanup which is, of course, the primary purpose. The AIA proposal contains an element of a positive solution, and we recommend your serious consideration and analysis of it.

The second problem is that no one can write insurance under a system which can arbitrarily assign massive liabilities to parties who may have no control over the loss producing events. No one will insure, at a price that would be considered reasonable, the best cleanup contractor in the country if that contractor may be liable not for his own actions but also for the failure of a site operator to properly contain the hazardous wastes. But that is the way the current Superfund law works.

We must address the current impracticalities of providing insurance in a market which even the most qualified contractor can be subject to massive liabilities for damage he did not cause and could not have prevented.

Again, let me speak for my own company, the Aetna Life & Casualty. I would suggest for consideration with respect to a licensed dump facility, all liability for cleanup or leakage be channeled to and limited to the owner/operator of the facility the only party with any real ability to exercise loss control. Generators who have properly identified wastes turned over the a hauler for delivery to a licensed facility or haulers which have properly identified wastes delivered to an approved site would no longer be potentially liable for subsequent releases over which they have no control. Insurance coverage for any conventional liability of hazardous waste generators and haulers would then be available in the private sector. The same would probably be true for qualified cleanup contractors with respect to their operations.

Even with such changes, however, the private sector would be unable by itself to provide coverage for site owners. This is because of the near certainty that leakage will occur and the open-ended nature of the resulting liability.

I don't have a ready solution for that problem, but I do know from personal involvement that the private sector and the Federal Government have worked together to address a number of hard to insure risks of the past including nuclear liability, the Swine Flu Inoculation Program, flood insurance, crime insurance, and riot reinsurance. I would propose that we work with you as we have in the past to develop an appropriate insurance mechanism to address the identifiable environmental liability insurance problems. We wish to work with you and your staff in furthering the cause of cleaning up our environment in a rational, prompt, and cost efficient way. We believe that we have offered positive ideas that will move us in that direction.

Thank you for letting me read so much of it.

Senator STAFFORD. Thank you very much, Mr. Jones. We understand the problem of presenting a statement that was prepared for somebody else.

I would suggest to my colleagues that, in view of the time constraints, that we limit ourselves on the first round not to exceed 10 minutes per member. Is there objection to following that?

Senator BENTSEN: Mr. Chairman?

Senator STAFFORD. Senator Bentsen.

Senator BENTSEN. I have to return to the Finance Committee, and I may submit some questions in writing.

Senator STAFFORD. Without objection, certainly that may be done by you or any other member who wishes to do so.

I understood also that you had some supplementary statements.

Mr. JONES. Yes, we do.

Senator STAFFORD. We would like to have those placed in the record rather than read.

Mr. JONES. I would like to mention that Aetna and Travelers are two of the largest liability writers, and they both have been examining their activities there. Mr. Bailey is gone, but Mr. Wheeler Hess, the senior vice president for the commercial lines of insurance at Travelers, is here and could state what his company has done as Mr. Bailey did in his statement.

Mr. HESS. With the Chair's concurrence, I would like to have 1 minute.

Senator STAFFORD. You certainly can have 1 minute. The Chair being entirely serious about these things, was going to express regret that Mr. Bailey isn't here because his company recently placed an insurance policy on a boat I own, and that may be a greater hazard for the company than insuring hazardous waste cleanup dumps.

Mr. HESS. I think it is one they can cope with, Senator.

Senator STAFFORD. We would be glad to give you a minute, Mr. Hess.

Mr. HESS. Thank you.

STATEMENT OF WHEELER HESS, SENIOR VICE PRESIDENT, TRAVELERS INSURANCE CO.

I am Wheeler Hess with the Travelers Insurance Co., and I agree with Mr. Bailey's comments. I think it appears that we need some fundamental reform, but I don't want to imply that those reforms are going to necessarily finance the cleanup of this country.

I have been an insurance underwriter for 29 years, and I never did know and I don't know now how to insure a dump against pollution or cleanup. I don't think we have the technology to dispose of waste without polluting the dumps. I don't know how to determine the premium necessary to clean up a dump, today or in the future, or to defend all of the parties that can be sued under our present laws.

I used to feel confident that I could insure someone, especially someone who complied with all of the standards for fortuitous losses from pollution, but never for intentional pollution, including damage to dumpsites themselves. Today, I am concerned about anyone who generates or handles any toxic substance, because I can't fathom the extent of their liability. In most cases, in good judgment, gentlemen, I cannot insure them.

That is contrary to the purpose of my existence. So, I would like to see reforms that would make some of these exposures predictable and insurable.

Thank you.

Senator STAFFORD. Thank you very much.

Let me ask this question of any member of the panel who wishes to respond. The committee has heard a great deal of discussion during the past several weeks about recent court decisions, especially Jackson Township. For the record, was Jackson Township a suit under Superfund law? As I understand it, the decision was based on a judicial interpretation of the insurance contract in question following a lawsuit based on common law with no involvement, either directly or indirectly, of Superfund law.

Is there anybody on the panel who could give us the correct answer to that?

Mr. JONES. Yes, Mr. Dennis Connolly.

Senator STAFFORD. And I would say that if I ask a question that the panel prefers to answer in writing, that is perfectly acceptable as far as I am concerned.

Mr. CONNOLLY. The fact is that Jackson Township case, unlike some of the other cases which we have provided in a paper to some of your staff, is not a Superfund site. The waste management in Carolina's case against Peerless Insurance is a CERCLA or RCRA 7003 case.

Nevertheless, these cases do establish the meaning in the States in which they have been decided of the language upon which insurers rely not to provide insurance for onsite, gradual events or intended events.

Senator STAFFORD. Thank you very much.

Mr. BERNSTEIN. Could I answer that question?

Senator STAFFORD. Certainly.

Mr. BERNSTEIN. I think the important thing to recognize is that these cases set up a pattern and a framework in which insurance companies underwrite business. I think that if there was an insurance company in this room today who had any doubts about whether it was going to continue writing pollution insurance—and I submit that there probably weren't, that there weren't any companies who were going to continue to write insurance, and I also submit that pollution insurance——

Senator SYMMS. I couldn't hear you. Could you speak a little bit louder?

Mr. BERNSTEIN. I submit that there were not any companies in this room who intend to write pollution insurance anyway, but the framework of those cases and the very testimony of EPA and Justice ought to scare them even more. Any insurer who is willing to write a piece of pollution business, recognizing the admitted deep pocket aim of the Justice Department and EPA, is irresponsible to its policyholders, its stockholders, and shouldn't be in business. I submit that by the end of this summer, there will be no pollution business being written in the United States.

There may be development of new policies by the insurance services office. Those policies are not qualified under RCRA because they are written on a claims-made basis. You are not going to have RCRA insurance. You are not going to have municipality insurance. You are not going to have the basic environmental insurance that this committee wanted when it wrote Superfund.

Senator STAFFORD. All right. On that cheering note, let me turn to the next question.

Based on the information which the committee has received to date, the insurance industry seems to have two problems, one in the past and the other in the future. The past problem is that, from your viewpoint, insurance contracts which were not intended to cover nonsudden or nonaccidental pollution are being interpreted to find that coverage exists. Because of these decisions, you are unwilling, at least for the moment, to provide any coverage whatsoever against pollution which is creating a prospective problem for all of us.

One of the things some members of the insurance industry would like to see happen is some fix for the past problem. As I said in my opening statement, however, it is not at all clear that your industry would provide insurance in the future even if we solved your past problems completely.

Is that correct?

Mr. JONES. Yes, sir.

Senator STAFFORD. That is correct? There isn't much need of my asking the second part of that question, then.

Mr. JONES. Well, go ahead, sir.

Senator STAFFORD. Are there circumstances under which we could be certain that you would offer insurance? I guess your answer to that is no.

Mr. JONES. *Well, that was the part—the American Insurance Association* does not have yet a plan to put before you that would permit us to write future. If I may be permitted to speak again for Mr. Bailey——

Senator STAFFORD. Certainly.

Mr. JONES. He has suggested that if you channeled—his companies—that if you channel all liability in the future for seepage, to the siteowner, that then we could write the type of coverage we write on the cleanup man and covering him for negligence in his conduct or accidents occurring, sudden and accidental events occurring in his work, nonintentional things. We could cover the hauler. We could cover the generator if he hired a proper person and sent it to a licensed site, that sort of thing.

Now, what about the site operator? He says that you channeled all the long-term gradual liability into him and the private sector still could not do that, be we would be willing to talk to the Government about doing it under a joint program as we did under riot reinsurance of 1967, as we did under flood, as we did it under swine flu with President Ford's inoculation program for swine flu. We would be willing to sit down and work with you, but solving all of our problems of the past would not be adequate to let us write for the future, because of the certainty of seepage under present technology, as Mr. Wheeler Hess said, the present technology is not adequate to contain these sites. There has been too much emphasis on litigation and less on technology to learn how to dispose of the waste that we are going to have.

Senator STAFFORD. Well, you encourage me, Mr. Jones, I hope that communications between this committee, its staff, and your industry will continue so as to see what can be constructively worked out, and not to come to the conclusion that nothing can be done. So, I welcome what you have said.

Mr. BERNSTEIN. Senator Stafford, may I add to that in terms of your encouragement to give you perhaps a little more encouragement? I guess, for those who aren't identified here, my name is Bernstein.

The EPA and the Justice witnesses in casting the problem in a breakdown between past and present and future, I think, obscure the difficulties that we have in writing business. If retroactive insurance is imposed on us under CERCLA, and we have liabilities for which we took in not a penny of premium before 1980 when we wrote those policies but which policies will cover acts under those policies, we are going to have a tremendous drain on our surplus regardless of whether we wrote another policy.

If that problem is not cured, there are real solvency problems that are faced by insurance companies in this country and problems, if not of solvency, of ability to write other lines of insurance, your basic homeowner's insurance, your fire insurance, your auto insurance. There is just so much money available. Insurance departments also put restrictions in relation to the amount of premiums you can write with regard to the surplus. There are all those problems.

If that problem is not solved, I think we can forget about any hope of writing future insurance. If that problem is solved, you still have other problems to solve, and that is to make CERCLA an insurable risk which it is not today. If it is insurable, theoretically, you may still have problems developing premiums because of the problems that Mr. Hess pointed to, but at least you are one step beyond where you are today where there isn't a prayer of this insurance being written in the future.

Senator STAFFORD. All right.

Mr. CONNOLLY. Can I add to that just for a second?

Senator STAFFORD. Yes.

Mr. CONNOLLY. I just wanted to point out that as the witnesses from Justice and EPA pointed out, we are working with them to try to develop those instances where we can operate. I would also like to point out that one of the other lines of liability that our company might have difficulty with is boat owner's liability.

Senator STAFFORD. All right.

Senator Burdick is next in line. We are following our custom of recognizing members in the order of their appearance here this morning. Senator Burdick arrived when I did.

Senator BURDICK. I just have one question. I simply want to make sure I heard it right. I notice in the testimony as given that you are not very happy with some of the court decisions. I believe, Mr. Bernstein, you said that if that law came today, there would be no more insurance of this type written.

Mr. BERNSTEIN. I believe I said there will be no more insurance under that law under the current circumstances.

Senator BURDICK. Is that the view of the entire industry as far as you know?

Mr. BERNSTEIN. As far as I know, yes, and not only of the U.S. industry but the foreign reinsurers who are so innovative in the environmental impairment insurance area. Insurance, reinsurance is drying up. I think by the end of this summer you are going to find municipalities and others totally unable to purchase environmental cleanup insurance.

Senator BURDICK. And you base that answer on the fact that these decisions have gone in a direction you didn't like?

Mr. BERNSTEIN. No. I say, Senator Burdick, they come from a number of factors. The decisions are very important ones. The question of ignoring the sudden and accidental language of a policy means that you can't write a policy that is in simple language and have a court do anything else but look for the deep pocket. If you have a court find no causation and still liability, that is another deep pocket effort.

What we are seeing is a pattern of judicial efforts to go to insurance companies to find that money. We didn't take in premiums based on our understanding of what we were insuring. We don't have sufficient surplus. We can't set up adequate reserves. We can't pay them. So, we have to cut our losses as much as possible, and it is bad enough that we are still going to have to fight that retroactivity regardless of what this committee or Congress does, but certainly we are not about to expose ourselves to additional liability under those same ground rules.

Senator BURDICK. In other words, if the decision stands and the law stands, there won't be any insurance written in this area?

Mr. BERNSTEIN. That is correct.

Senator STAFFORD. I would say moreover, I get the impression that those of us who have life insurance can't afford to die.

Senator Symms?

Senator SYMMS. Thank you, Mr. Chairman. At least we don't want to. We are not going to rush it, anyway.

Mr. Butler, this morning I asked some questions of Mr. Habicht from the Justice Department about the transaction costs. My question to him was, How much money are we spending on litigation costs, et cetera, that we could be spending on an actual cleanup? The answer was a little bit obscured, I thought. I understand that you have had a study. Would you comment on the results of the study that was done regarding what the level of those transaction costs are?

Mr. BUTLER. Likely future transaction costs would range from about $3.5 billion to about $6.5 billion.

Senator SYMMS. $3.5 billion to $6.5 billion?

Mr. BUTLER. Yes, and we assume that there will be——

Senator SYMMS. Are you talking about lawyers' fees?

Mr. BUTLER. I am talking about lawyers' fees. I am talking about in-house counsel and technical staff in-house, pulling together the materials.

Senator SYMMS. Our entire Superfund Program is a $300 million program currently, in terms of paying for the Federal side of cleanup. You mean the private sector is paying $3 billion just in lawyers' fees?

Mr. BUTLER. That assumes that there will be an eventual cleanup of 1,800 sites. This is the EPA's baseline assumption that they have used in the 301(a) report to Congress. Assuming their estimates of $8.1 million cleanup per site, that would mean the total expenses in direct cleanup costs would be about $14.6 billion. In addition to that $14.6 billion, I am saying that $3.5 to $6.5 billion would be incurred in transaction costs in getting the responsible parties to settle and clean up.

Senator SYMMS. How can these transaction costs be cut and still assure that the people who pollute make an effort to clean it up?

Or do you have a recommendation? What could this committee do to reduce the transaction costs and if we did reduce the transaction costs, how many more sites could we clean up?

Mr. BUTLER. I think one of the things that the committee might be able to do is to consider a mandatory apportionment scheme. From a number of the attorneys that I have been talking to, they tell me that uncertainty with respect to apportionment causes a considerable amount of litigation cost. You have discussions at every site that my waste isn't as toxic as the next person's waste, and you shouldn't use the volumetric share basis because you have toxic waste and I don't.

Somehow, Congress could resolve that dispute initially and come up with a system that could be easily applied at each site, you would avoid those arguments at each site right now and maybe save a third to maybe as much as a half of the transaction costs that we are projecting.

Senator SYMMS. Thank you very much.

Mr. Jones, in Mr. Bailey's statement that you read this morning, he referred to the AIA proposal and then you made reference later on to the swine flu and nuclear liability and so forth: are you saying that the insurance company takes the first so much liability and the Federal Government would take the biggest?

Mr. **Jones**. In the second part, in the part that was Mr. Bailey's part, he was proposing that we work out a program where the insurance companies service it and probably take a beginning share but be backed up ultimately by the Federal Government by one system or another. In swine flu, we took the negligent responsibility of the manufacturers and distributors, and the Government took the responsibility for the inoculation program itself. In riot reinsurance, we created a reinsurance program where companies could buy reinsurance from the Government. The Government stood behind its own reinsurance program, and it never had to contribute. The premiums that the companies paid to the Government were adequate to cover the claims of the companies against the Government.

There are different forms that we could use. In nuclear liability, Mr. Schmalz is one of our great experts on the Nuclear Liability Program, having been involved in it from the beginning. Also, there is no one that knows more about the history of our policies and how they were developed than Mr. Schmalz.

Senator **Symms**. Where were we before the Superfund legislation passed the Congress with respect to this? What happened before that? What was the liability and where were we?

Mr. **Hess**. May I respond, Senator, for me?

Senator **Symms**. Yes.

Mr. **Hess**. At Travelers, we had no problem insuring the fortuitous losses arising out of pollution so long as they were offsite, third party, and unintended. We were not covering dumps, the cleanup of the insured's own premises. We were not covering liability for other than our insured's own negligence. We had, perhaps, a false sense of some predictability.

Senator **Symms**. Then, what happened in that legislation specifically that has created the problem? That is what I am getting at.

Mr. **Hess**. Now I will turn to a lawyer.

Mr. **Jones**. Well, I wanted to mention to Senator Burdick that there are two lines of cases that are concerned. One line was the one that concerns our insurance policies for these past events. The other is the line of cases that arose under the Superfund that have made it not insurable for us to undertake. One was, they imposed almost an absolute liability. The only exceptions recognized are an act of God and an act of war and one other obscure one.

That is the difference between this and the testimony that the professor gave when he was up here. He was talking about oilspill, and that is not the standard of conduct under the oilspill act, the Clean Water Act. There it is a strict liability and there are some defenses. Also, those are sudden and accidental events that we can cover. Also, that was prospective and that was the reason we could do it.

But the liability that is developed under these court interpretations, you didn't say were statutorily joint and several; the court said you said joint and several. Then, quite aside from the unfairness of joint and several, from an insurance point of view, it means that we might insure someone and we know what his operations are and what his exposure is, but he might be held liable for the exposure of others, others that he is not even acquainted with, certainly with those that he isn't in a joint and several activity together.

So, that is one thing that came up under the Superfund, and it came because the Justice Department and the EPA sought it, not because you gave. And there has been a case that recognized the harshness of it but still went along with the Justice Department.

Then, you don't even have to show that the substance that you had caused any actual hazard, just that you dumped a substance into it, not that your substance did anything. There was a case on that, and that was the position of the Justice Department they pushed forward.

You can be held liable for the cleanup of a site if you put a hazardous substance in a trace amount in that wasn't even at a reportable level. They argued that in the *United States* v. *Wade* case.

They don't have to show a causal connection. A manufacturer can be held completely liable for an improperly managed site when he used due care, when he followed all existing regulations, and even though his trace elements cannot be shown to have been even released from the landfill. That was the position that the Government took and argued in *United States* v. *NEPACCO* and also in *United States* v. *Montolo*.

So, that is the series of cases. That is the trend, as Mr. Bernstein said. Those are the ones that brought about the system of liability under Superfund that is totally different than under the Clean Water Act.

Senator SYMMS. Thank you very much.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Symms.

In summary, if I understood the testimony recently, had the insurance policy, for example, in the Jackson Township case been construed as you believed you had written it and for which you had extracted the necessary fee, then you wouldn't be in the problem that you are in now, if that line of decisions had been carried out.

Mr. JONES. That is one part of the problem and that is a key case, and that line of cases of retroactive liability for things that we didn't think our policy covered. Mr. Schmalz was there at the development of the policy and has been so through the years.

Senator STAFFORD. I realize that is part of the problem, and I won't get into the other because that has been testified to.

Senator Mitchell?

Senator MITCHELL. Thank you, Mr. Chairman.

I thank all the witnesses for their testimony and for their coming here. They have pointed out what is, I think, a serious problem and something with which I think this committee must deal.

At the same time, I must say I don't agree with all of the statements that have been made, in fact, I strongly disagree with some of them. So, just as I questioned the Government witnesses from your standpoint, let me turn around now and ask you some questions based upon their point of view.

The first is, much stress is given in the written statement and in comments made in response to a question by Mr. Butler about legal expense and transaction expense and delay in the legal system.

I must say to you now what I said to you privately yesterday, Mr. Jones, I think it somewhat unseemly for the insurance industry to come in and make that kind of statement since anybody familiar with the legal system in this country knows that overall a very substantial portion of the delay and legal expense in the courts in this country is directly caused and stimulated by insurance company lawyers. Delay through time consuming and expensive pretrial litigation is a standard weapon of defense in court and other forms of litigation in this country spawned and paid for by the insurance companies. You are the ones who are footing the bill for that.

So, having used that as a weapon all these years, you are entitled to come in and cite it as a problem, but I think in fairness you ought to acknowledge that you have contributed to that aspect of the problem and I think you now find yourselves in a very difficult situation with respect to that in other areas unrelated to this. And I think that really must be stated and acknowledged.

Second, the construction of policies in a manner adverse to the interests of the insurance company is not a new problem. It has been with you since insurance policies have been written. In numerous fields, this has occurred as court after court has adopted the principle, now universal, of construing insurance policies against the writer of the policy, given the different level of knowledge and economic power of the two parties to an insurance contract, the company and the individual.

So, you are faced with a difficult situation, one which we share and with which we must deal, but this is not something new with which you have not ever dealt. You have faced it over and over and over again throughout your history.

Mr. Bernstein made a very strong statement, no companies are going to write this insurance anyway, and then painted the specter of, we may not even be able to write other forms of insurance, the more standard form of homeowners. That fact or that prediction must be accompanied by the knowledge that in 1984, property and casualty insurance companies suffered underwriting losses of $21 billion, not through the Superfund, but through your own operations.

I guess what is an industry standard or at least a well-known publication in the industry, Best Review, recently went down in a January 1985 issue and cited each area of property, casualty, business, with very gloomy predictions, malpractice, homeowners, straight fire, auto, loss after loss after loss, and for the first year, your investment income did not exceed your underwriting losses. So, while this is undoubtedly difficult for you and this presents real problems, I don't think it is wholly accurate, Mr. Bernstein, to paint that picture and seek to imply that somehow you are not going to be able to write fire insurance or homeowner's insurance because of the Superfund.

If that happens, this might be a factor, but it is going to be a very small factor in relation to the overall situation that the industry finds itself in. Now, that is a serious problem and that is something that we have to deal with, but I think it is not a wholly accurate picture that has been portrayed in the statements made.

Mr. BERNSTEIN. May I respond and indicate why I believe it is wholly accurate?

Senator MITCHELL. Yes.

Mr. BERNSTEIN. The industry lost considerable billions in 1984. It is not those losses that are impeding its ability to write insurance. It is the prospective losses under Superfund.

The Office of Technology Assessment has estimated potential cleanup costs of up to $100 billion which is some $40 billion more than the industry has in available surplus. That is the threat. The threat of the retroactivity of CERCLA, of EPA, and Justice who sat here and blandly admitted to you that justice be damned as long as we can get the deep pocket, as long as we have the ease of getting at those defendants, that is what we want.

Senator MITCHELL. They didn't say that, Mr. Bernstein.

Mr. BERNSTEIN. That is the message I got.

Senator MITCHELL. That is your characterization of their testimony.

Mr. BERNSTEIN. Well, that is my characterization.

Senator MITCHELL. They didn't say that.

Mr. BERNSTEIN. Because they said, we don't care about the problems of joint liability. It lets us get there faster; it lets us get a solvent defendant. That is the message I got from them. If that is true, then the end has suddenly justified the means which is not what I believe the justice system is in this country.

More important, it is the liabilities under Superfund, the vast liabilities that are different in kind than anything we have ever faced before. They are different in kind from swine flu and different in kind from medical malpractice. They are even different in kind from asbestos although that brings a terrible threat to the ability of the companies to write additional business.

Senator MITCHELL. Don't bring up asbestos; you will really get me going about the insurance industry there.

Mr. BERNSTEIN. But the point is, the drain on surplus means you will only have a smaller amount of surplus available to write the other lines of insurance. What I am saying is, this problem is like nothing before. When 10 or 12 courts do what the Jackson Township court did and throw out the plain English definition of sudden and accidental, then we are in real trouble. And when that is applied to contracts retroactively, then the trouble is compounded and we are not going to have the surplus needed to write the insurance of this kind.

Senator MITCHELL. Well, first it should be repeated, as Senator Stafford made clear, that the Jackson Township case had nothing to do with the Superfund.

Mr. BERNSTEIN. But there are cases——

Senator MITCHELL. Nothing whatsoever.

Mr. BERNSTEIN. But there are cases under Superfund that pose the same type of liability problem, and those cases, when put together with what is clearly the same attitude as Justice and EPA have, let's find the deep pocket, that is what scares us. Our pocket is not that deep. Our pocket has only $60 million of surplus available and that won't cover Superfund. So, if Congress is looking to the insurance industry to bail out the Superfund costs, it isn't there.

Senator MITCHELL. Well, Congress is not looking to that, and I don't think, in fairness to the Justice Department or EPA witnesses, with whom I disagreed sharply in many respects, that they said anything that could fairly be characterized in the manner that you have described it. You may disagree with them in substance, but I just think that—they don't have a chance to come back and respond—I think that you have seriously mischaracterized what they said.

What they did say on joint and several liability, and before I get into that, first, it should be recognized this is not a novel concept of law, as stated in the written statement presented. Joint and several liability is as old as our legal system. It exists in many States in the Union, wholly independent of this area.

What they said was that if the objective is to speed up the process and to reduce the legal expense, both of which you have identified as principal objectives which you seek to achieve, than that can better be achieved by joint and several liability because it creates an incentive for the multiple defendants to negotiate an apportionment of responsibility among themselves, and that if you remove the principle of joint and several liability, there will then be no such incentive and every case will have to go through a full-fledged trial during which liability and apportionment will be established.

Now, to me that is not an unreasonable argument. It may not be persuasive. I have problems on joint and several liability in terms of the fundamental potential unfairness of saying you six people are responsible and he is 1 percent and you are 90 percent and he should be reliable for the whole cost. Leaving that aside, I would ask you to address that argument. Is that correct? And if it isn't correct, why not?

Mr. JONES. May I go back to the other comment you made after I address that one?

Senator MITCHELL. Sure, yes.

Mr. JONES. Obviously, if we do go to those full-scale trials, it will increase the litigation costs. There isn't any question about that.

Senator MITCHELL. If we eliminate joint and several liability?

Mr. JONES. Oh, no. If we—well, what else do you do? If that is the only thing——

Senator MITCHELL. Well, here is their argument. Let me state it again. I thought you were all here during their testimony. What they said was, listen, you have six defendants. Each one now has at least a theoretical possibility of being held liable for the full amount. So, that serves as a powerful incentive for them to get together to negotiate their relative apportionment and then to reach an agreement on the case.

If you eliminate that, then each defendant will insist that there be some formal mechanism for determining their responsibility. You are going to disagree about that, and since you don't have the threat of being held responsible for the whole thing, in other words, the most you can be assessed is the amount for which you are ultimately responsible. Why should you ever agree in advance of a trial to pay that amount? So, what they said people will say, and it is human nature and I think for anybody with trial experience it strikes a responsive chord, is if you know that the most you can be responsible for is $50,000, why should you volunteer to pay that up front when the worst that can happen to you is to go through a trial and you might lose everything and be responsible for $50,000.

In other words, it will induce trials. It will encourage delay and litigation, the very thing we are trying to eliminate.

Mr. JONES. We have been advised that people have gone in and offered to pay what they considered an appropriate price to EPA if they would be left out and not dragged in and have to incur a lot of litigation expense and have been turned down.

Senator MITCHELL. Would you give us the names of those companies and the situation so we can look into that?

But what about their argument? Do you disagree with that?

Mr. CONNOLLY. Can I try a shot at that?

Senator MITCHELL. Yes.

Mr. CONNOLLY. I am somebody who started my career as one of those insurance attorneys that you mentioned. I have some disagreement with your assessment that it was our responsibility alone in delaying.

Senator MITCHELL. Oh, I didn't say alone. I absolutely did not say alone. But a substantial proportion.

Mr. CONNOLLY. But what I would like to say is——

Senator MITCHELL. Do you deny that that is a common occurrence?

Mr. CONNOLLY. In fact, in our office, I would deny it.

Senator MITCHELL. Oh, well——

Mr. CONNOLLY. I would have denied it. We used to sit—I will discuss that maybe with you at some other length, but——

Mr. JONES. I want to respond later, too, but go ahead.

Mr. CONNOLLY. But what I would like to suggest is that the magnitude of litigation costs associated with the kinds of liabilities that arise in this area and in the area of growing expansive mass action for environmental liability has associated with it tremendous litigation costs. We have never encountered anything like it before. Past history on that is not terribly relevant. That is one.

Two, we in the industry are capable of responding promptly, I think, to developing methodologies to settle cases. Where you can have a target—the claims people have traditionally done this—I will pay 5 percent, you pay 4 percent, and we do it. That is a history that we have. What we don't have is the history of $100 million losses where you pay 4 percent, I will pay 5 percent, and the Government is going to make the third guy pay 90 percent.

In the case of Conservation Chemical, where one company contributed ½ percent volumetrically, that they may be caused to pick up the entirety, and they are a large, large company.

Senator SYMMS [presiding]. Thank you very much, and thank you, Senator Mitchell.

Senator Domenici is next, and I just would say that I will be chairing the remaining part of the hearing. It is my intention to stay here until we are completed, so I hope that we can move along as fast as possible.

Senator Domenici.

Senator **Domenici**. Thank you very much, Mr. Chairman.

Let me first apologize both to the committee and the witnesses for myself, because I have been unable to adequately prepare myself for this hearing. I am not reluctant to tell you that, but I do intend to get prepared because I sense that something is very wrong. I can't tell you exactly what yet, but something is very wrong.

I understand, now, that we have a common law decision unrelated to Superfund that establishes retroactive liability for an act which was legal when it occurred and the court has not only construed liability but has read your policy in a way that none of you thought was intended.

Clearly the point has been made over and over that Superfund doesn't have much to do with that at this point. Maybe we have a responsibility, nonetheless. I don't know. I tend to agree with Senator Mitchell that we have to do something in this area.

But let me ask you now, with reference to retroactive liability, strict, joint, and several, under the Superfund law. Are you telling the committee that either EPA or any court has found that this Superfund law imposes strict, joint, and several liability retroactively?

Mr. **Jones**. Yes, sir.

Senator **Domenici**. Which one, EPA or the courts?

Mr. **Jones**. Justice argues that in every one of their cases, and Justice takes the same position. And we can give you the citations of those.

Senator **Burdick**. Would the Senator yield? Can we have those citations?

Senator **Domenici**. Yes, I would like to have them, please.

Mr. **Jones**. All right. (See p. 177.)

Senator **Domenici**. I have been through so many conferences on legislation in the last few years, and this is the first committee outside of the budget that I have heard numbers like $100 billion, but I was on the conference and I was on the group that met and settled the Superfund disputes. My recollection is that that was done in Howard Baker's office. Some of the staff is here and nodding their heads.

It was my assumption—and I will follow it up in terms of the history—it was my assumption we did not intend to impose joint, several, strict liability retroactively on this based upon the substantive law of the Superfund. Now, we did not necessarily change the common law which was evolving on strict liability. It had been evolving and we were told that it had been evolving, and joint and several was evolving. I certainly don't remember that we ever tried to write that out of the law, but it wasn't my understanding, we did not intend to write it in the law as an express new cause of action.

Is there anybody on the committee that remembers that activity? I was there.

Mr. **Jones**. I can't cite it right now, but I have seen a printed statement of Senator Baker that was substantially to that effect, at that period of time.

Senator **Domenici**. My recollection of it is the result of it was a statement coming out of that group of Senators and Senator Baker was in on it, not only because he was a member of this committee, but as I understand it, he had organized the meeting because he was then majority leader trying to get something done.

Senator **Mitchell**. Senator, we really ought to have the staff do this, but my recollection is that the reference in the law to liability, to the question of joint and several, is a reference to a section of another law.

Senator **Domenici**. That is correct.

Senator **Mitchell**. In which the principle of joint and several liability had been previously utilized.

Senator **Domenici**. That is correct.

Senator **Mitchell**. So that it was, I think it was clear that was intended.

Senator **Domenici**. Well, let me tell you what I think happened there. I think that is right. I will speak only for myself on this one, and I have no reluctance to acknowledge when I am confused or not properly informed. That used to bother me, but it doesn't any more.

Clearly, it was not my understanding when we had told the staff to make the reference to section 311 that I had it explained to me that that was an automatic accepting of the notion of strict, joint, several, and retroactive liability as a new cause of action under this fund. Frankly, I really don't think that I intended it, and we will have to work on it from what I can tell. That may not do anything for the common law as it evolves.

Let me ask a question about a case that people keep citing to me. Maybe it will give some of us an idea of what is going on. What is the ChemDyne case? Can somebody quickly tell me about that case?

Mr. **Jones**. Dennis, do you want to——

Mr. **Connolly**. I will pass on that. I have so many cases floating in my head that picking individual cases out. George, we have discussed that.

Mr. **Bernstein**. Yes. That is the Federal district court in Ohio that ruled it was joint and several liability under CERCLA at the urging of Justice Lou——

Senator **Domenici**. Retroactive?

Mr. **Bernstein**. Well, they applied it to all—CERCLA is applied retroactively so that was not the issue there, as such, but the result was the same.

Senator **Domenici**. I understood that certain hazardous substances in barrels were moved from one place to another and moved to a recommended site being a very small portion of what was on the subsequent recommended site. I don't know that it was a legal site, but a governmentally recommended site, a very small portion of what was put there by a company with a——

Mr. **Jones**. Half of 1 percent, sir.

Senator **Domenici**. All right. And who proceeded to bring that company and that company's insurance company into the litigation?

Mr. **Jones**. Justice Department.

Senator **Domenici**. And is that EPA?

Mr. **Jones**. Yes, sir.

Senator **Domenici**. The lawyers for EPA?

Mr. **Jones**. Yes, and it is cited at 572 Federal, at page 802 in the southern district of Ohio, 1982.

Can I give you one other? There are a number of other defendants, and this is the kind of thing you run into when people feel that the system is unfair. The estimated cost of cleaning up that site is $6 million. The testimony is that the private litigation expense thus far approaches $11 million, almost twice the cost of what cleanup would have been.

Senator **Domenici**. And why is that?

Mr. **Jones**. They feel it is unfair, and there are a number of defendants. Each one has their own costs. They just are resisting this type of action by the Government.

Senator **Domenici**. Right. So, the reason I brought it up is because Senator Mitchell has asked very, very good questions, some that cause me to rethink and others that have caused me to be very concerned about the future, but he raised the issue of whether Justice and EPA were correct in their assessment that the joint and several liability and their approach to going out and using it was causing settlements that wouldn't otherwise occur and thus carrying out what they assume to be their charge, that is, to get that done through private liability as much as possible.

This is a case where the reverse has happened. Is that correct?

Mr. **Jones**. Right, sir. Yes, sir.

Senator **Domenici**. Are there a number of those that you might cite for the committee where, instead of causing a settlement, it has caused this kind of excessive litigation?

Mr. **Jones**. Yes, we can make a search for those and provide them. Yes, sir.

Senator **Domenici**. With some background so we would understand.

Mr. **Jones**. All right. (See p. 177.)

Mr. **Bernstein**. Senator, I think one of the cases that speaks for itself is the type of case that Mr. Connolly cites where a large, very substantial corporate defendant who is responsible for one-half of 1 percent is going to be subject to possibly half of the total liability or even more. You can bet your bottom dollar that company is going to fight the case. There is no settlement. That company wouldn't be at the table, wouldn't have been named in a law suit if it had the opportunity to settle for that one-half of 1 percent responsibility.

Senator **Domenici**. Let me ask you just one other question, and then I will quit.

It seems to me that in a site there are apt to be private polluters and public polluters. I happen to have been in city government. It seems to me that when we are talking about landfill sites, obviously an awful lot of it is the cities themselves untraceable to anyone else. I assume there is some private involved. And there may be State or Federal Government.

The Federal Government is not liable outside of apportionment under Superfund, under immunity for any of its liability. Most States have sovereign immunity. What happens to their portion in these efforts to settle? Where does that money come from?

Mr. **Connolly**. Well, under joint liability, that could be picked up by the fund.

Senator DOMENICI. But what I am asking is, does EPA offer to use the fund in an apportionment approach for that portion which is public?

Mr. CONNOLLY. No, not that I know of.

Mr. BERNSTEIN. In fact, Senator, I think if you look at the numbers that EPA gave us this morning where they spoke of the fact that they have in effect settlement commitments of about $330, I think,—that was the figure I recall—and that is essentially what they have expended out of the fund, it is a coincidental number. I think it may mean they are not about to dip into the budget for money. They are looking for that deep pocket, and until and unless they get it, you may have a real slowdown in cleanup expense. They are not willing to go to the fund and use those moneys that are supposed to be there, and they are waiting for the deep pocket. That is another indication of what the motivation is of joint and several.

Senator DOMENICI. I have no further questions other than I would like to ask the chairman if he would submit a question to EPA on the last issue. I would like to know from EPA how much they have expended on litigation of this type and how much money of their own out of the fund, if any, they have spent in an effort to settle cases by way of Government share, if any.

Senator SYMMS. We will submit that question on behalf of the Senator. (See p. 64.)

Mr. JONES. Senator, I just wanted to say something more about joint and several. You mentioned Senator Mitchell's comment about it. Joint and several as it existed in the law until 1973 concerned people that actually jointly worked together. There was a connection between them. They were held jointly liable, and if one could not respond, then the other would respond for both of them.

It was not until 1973 and the Borel Fibreboard in the 5th circuit case and the asbestos came up that we, for the first time, as an industry, saw people being held liable for the liability of others on a joint and separate theory where there was really no joint relationship whatsoever. That is the reason we can't write insurance under that condition.

Senator DOMENICI. Thank you very much.

Senator SYMMS. Thank you very much, Senator Domenici.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, thank you.

It has been a very interesting discussion for me to listen to. I thank the chairman for scheduling the hearing for what is now obviously and euphemistically referred to as "an insurance problem." And it surely is an insurance problem, the inability of contractors to purchase liability insurance that would allow them to participate in Superfund cleanup. That is what we thought we had in mind.

Now, we are seeing litigation where firms battle their own insurance companies over the proper interpretation of the policies which may or may not have been intended to include Superfund. That is not what we had intended to get into, and I know because I was one of the early drafters of Superfund, and I remember the meeting with Senator Baker, at least portions of that. I was there at some of that.

We are unable, at least, I have been unable so far to obtain information from EPA as to transaction costs. At one time, I think, in motions filed in the *Conservation Chemical* case, there was a great discussion of pretrial litigation costs alone that would exceed cleanup costs. A study by EPA reports approximately 50 percent of the Superfund spending over the next decade will be aimed at transaction costs.

The reason they are called transaction costs is because they really mean lawyers' fees. I practiced that profession for 20 years. This is an extraordinary venture into a lawyers' fee fund. While we talk and shroud it in cancer and deformed people and everything else, we are missing the point. That is where the money isn't going.

We are going to see a lot more of that, especially when pretrial costs are greater than settlement, and we find that law firms nowadays ought to be called the firm of Doberman, Pinscher, Collie, Spitz, and Xerox because they get into depositions and depositions and pretrial and discovery to see who can exhaust the client's resources before it goes to the right source. The lawyers will pay a dear price for that in the future, but that is not what I want to talk about.

What Senator Mitchell is saying is very true, and having dabbled a little in the defense area and in the plaintiff's area and watching and dealing with insurance companies, you have really brought it on yourself sometimes. I know; I was there. You say, you know you could settle that for $2,000 but oh, no, no. So, you go to trial and peel them for about $250,000 and then they wake up and smell the coffee. I have been there. I have enjoyed doing that. And so there is an element of that in this thing.

Senator SYMMS. Senator, on that note, I have to tell you what my brother, who is my partner, in Idaho would say to that. He would say, don't blame the lawyers, just blame the guy that hired the first one.

Senator MITCHELL. Yes, well, they are sitting right out here. They just said they have a law suit that is over $6 million and they have paid $11 million in legal fees.

Senator SIMPSON. That is right.

Senator MITCHELL. Now, whose decision was that?

Mr. JONES. Well, it wasn't all insurance.

Senator SIMPSON. Wait a minute; I have a few minutes here. I have learned one thing about this game. Stick with it till I get mine.

We are not getting the transaction costs from EPA and I am not getting it from the staff. I will probably have to call Lee Thomas myself. That is a curious withdrawal of information. There must be some interesting things there. I am going to get that. (See p. 53.)

But what Senator Burdick was saying gets to the nub of this thing. If we have you people saying that you are just not going to write insurance, that it can't be done, then we have a whole new ball game here that we had better be paying attention to. I think that it this is an obsession here. I think somewhere, here within this group, we have determined to trash tort law. This is how we are getting to this situation.

Whatever happened to proving of a civil wrong, a responsible party, causation, provable damages, preponderance of evidence?

You see what has happened very swiftly in this arena of emotion and fear and guilt. We don't want to use tort law. We want to do something totally new, and it comes from impatience and emotion and it is adventurism of the first water. It will lead to destruction of civil remedies as we know it caused by some outrageous reaction to something which is serious but can be handled on a commonsense and thoughtful basis without just hysteria and babble, and that is what we get.

We are talking about Superfund and then somebody talks about purple ooze coming out of your shower head and sure that is true, but the point is we have to do what we have had to do for centuries in the civil law, and that is prove it. You can't prove it, and then you come in here and we put something together that no wonder attorneys get in it because they have to literally save their clients from destruction because of this absurdity.

I don't know how we got here with regard to an insurance problem, but, I guess, the real issue is that we can do all sorts of numbers on you, but if you won't write the insurance, then we better get back to the drawing board and do something that has a grain of commonsense.

Senator SYMMS. Thank you, and I want to thank all members of the panel. There may be some other questions submitted in writing. I think Senator Mitchell said he may have a couple more questions, and there may be a couple of others from the committee. I thank you all very much. You made a very excellent presentation.

Mr. JONES. Senator Symms, I understand——

Senator SYMMS. We have one more panel, I might say, before the Senators leave. We have panel No. 4 which is Mr. Neumeyer, Mr. Clay, Mr. Poirot, Mr. Farrell, Mr. Parker, and Mr. Zimmer, if they would please step up and get ready.

Mr. JONES. I understand, I hope the record will be left open for a while because we understand some other groups would like to enter comments in support of ours if that is possible.

Senator SYMMS. It will be open for 10 days.

Mr. JONES. Thank you very much.

Senator SYMMS. Thank you all very much.

[The information from EPA previously referred to by Senator Simpson follows:]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
EXTERNAL AFFAIRS

April 18, 1985

Honorable Alan K. Simpson
United States Senate
Washington, D.C. 20515

Dear Senator Simpson:

Enclosed are EPA's answers to questions you submitted to the Agency in connection with the Committee on Environment and Public Works' hearing on the availability of insurance coverage for CERCLA and RCRA facilities.

We appreciate the opportunity to clarify the Agency's position on these issues. Please let us know if we can be of any further assistance.

Sincerely,

Steadman M. Overman
Director
Office of Legislative Analysis

Enclosure

1) The 301(a) Study produced by the EPA reports that approximately 30% of Superfund spending over the next decade will be aimed at "transaction costs" (legal and administrative expenses).

a) How did you arrive at your figures in that Study?

There appears to be some misunderstanding about the 30% of Superfund spending that in the question is called "transaction costs." These costs are not only legal and administrative costs. They include all the expenses other than payments to contractors and States for on-site removal and remedial response.

The figures cited in the CERCLA Section 301(a)(1)(C) study ("Extent of the Hazardous Release Problem and Future Funding Needs") were calculated through use of EPA's Superfund Budget Forecasting and Financial Flows models. A more accurate title for the section of the Forecasting model entitled Administration and Enforcement would be Administration, Enforcement, and Program Support. Removal and remedial support constitutes the largest component of the Program Support category and represents approximately 14% of total projected obligations over the next 10 years. Activities funded include initial site discovery and investigation, hazard ranking, NPL listing, laboratory analysis and related costs associated with sampling efforts, investigations of potential removal actions, technical assistance and training to States and other parties involved in removal and remedial actions, and program evaluation/control activities of the hazardous substance response program.

Work of the other Federal agencies also represents a significant portion of projected Program Support obligations. Work of the Department of Health and Human Services, Department of Justice, U.S. Coast Guard, and others is projected to require approximately 4% of total obligations over the next decade.

b) Please break down the legal costs and how you defined them?

Legal costs are considered to be a portion of the Agency's overall enforcement costs. Legal costs include the costs associated with:

- negotiations for privately financed response;
- development and issuance of administrative orders to compel responsible parties to respond;

- initiation and support of civil, criminal and cost recovery cases referred to the Department of Justice;
- cost documentation and assembly;
- expert witness consultation and testimony;
- case preparation and presentation by DOJ attorneys.

In addition, there are enforcement support activities which the Agency has included in its projections. These include:

- data collection and analysis (e.g., water and soil sampling, engineering and geological studies);
- report preparation;
- quality control and assurance, including chain of custody procedures.

Enforcement costs are expected to represent approximately 12% of total costs over the next decade. Litigation costs, as a subset of enforcement costs, are expected to decline over the next decade as the government and responsible parties endeavor to settle their differences outside of litigation. Now that the liability rules have been set, parties can focus their attention on remedy rather than on liability. Moreover, as remedies are reviewed on the record, the legal costs associated with challenging remedies will diminish. As for the support costs, these activities will be carried out even where there is no litigation. Many of the most expensive enforcement activities, such as data collection and review, quality assurance and control, and report preparation, will be carried out regardless of whether litigation occurs.

c) Please define administrative costs in that context?

The Administration component of Administration Enforcement and Program Support consists of those activities contained in the Management and Support portion of the Agency's Superfund budget. Activities include Headquarters and Regional financial and administrative management, space, utilities and related expenses, ADP support, and costs of the Offices of the Inspector General, the General and Regional Counsels, Policy, Planning and Evaluation, and the Comptroller. Together, these activities are expected to consume approximately 2% of total Superfund obligations over the next ten years.

d) It is said that the Department of Justice and EPA maintain accounts for the billing of lawyers and other time measure expenses. Please describe any such system, where it is run, and what information it could provide?

EPA's Financial Management Division (FMD) maintains site specific accounts for each Superfund site in its Financial Management System (FMS). The FMS maintains a record of all EPA employee hours and associated salary that is charged to a Superfund site. Employees (both technical and legal) maintain bi-weekly timesheets of their site specific hours. These timesheets are the basis for records maintained in FMS. The FMS also maintains records of EPA employee travel associated with a particular site and site-specific contract obligations and disbursements.

The Department of Justice's Lands and Natural Resources Division (LNRD) receives Superfund money for litigation support of Superfund cases through an Interagency Agreement with EPA. LNRD allocates actual costs between the Division's regular appropriation and the Superfund transfer appropriation based on the level of effort expended by professional employees directly on cases. The Division's level of effort on Superfund cases will be determined by comparing Superfund case hours to total Division case hours. This information is maintained in the Division's Legal Time System. (Professional employees maintain weekly timesheets of individual case hours worked). The ratio of Superfund hours to total Division hours will be used to allocate a percentage of all Division costs (maintained in DOJ's payroll and accounting system) to the Superfund transfer allocation.

e) Do you have any information comparing administrative costs or legal costs faced by private parties and those of the government? If not, please suggest areas where such a comparison could be pursued and how it might be done?

The Agency does not have access to reliable information on the administrative costs or legal fees charged to private parties in Superfund actions. Any comparison of governmental and private party legal or administrative costs that might be conducted would require the availability of such private party data. Moreover, a comparison of legal costs is not likely to yield any meaningful data given the disparity between government and private legal fees. Given the limited resources available, however, the Agency makes every attempt to minimize its own legal and administrative costs.

f) Have any other parts of the government, in addition to EPA and the Department of Justice, studied the matter of transaction costs in the Superfund context?

We are not aware of any studies on the legal and administrative costs associated with litigation under Superfund. The GAO in its evaluation of the section 301(a) studies provided alternative program estimates which may have included alternative transaction costs. No other Federal agencies were consulted regarding specific "transactions costs" of conducting Superfund activities. Instead, an estimate was developed for all "Other Agency Support", based on the current (FY 85) support ratio.

g) Does the EPA or any other government office plan to monitor the issue of transaction costs in the future? Are you or anyone else planning to study ways in which such costs could be cut?

For cost recovery, budget, and management reasons, the government will, of course, continue to monitor its own expenditures. Further, like all Federal agencies, EPA is acutely aware of the need to effectuate savings wherever possible and takes every opportunity to do so. At present EPA does not have plans to monitor private legal costs relating to Superfund litigation.

In this connection, the Administration included several provisions in its Superfund bill to keep down legal costs. As noted above, the Administration hopes to keep down the costs associated with challenging remedies by providing for record review of remedial decisons. Similarly, by providing for contribution protection where parties settle with the government, the Administration hopes to promote settlements and cut down on the litigation costs associated with contribution actions. Furthermore, by providing for Section 104 consent orders, the Administration hopes to encourage responsible parties to undertake investigations and feasibility studies without litigation. Finally, the Administration consciously decided not to include a citizen enforcement or federal cause of action in its bill, in part out of concern that such provisions might foster substantial litigation that is not related to site cleanups.

2)· In motions filed in the Conservation Chemical case, it was recently suggested that pre-trial litigation costs alone would exceed the projected clean-up costs.

a) What does this suggest about the operation of the Superfund?

Total government expenditures for investigations, administration, enforcement, and litigation in the Conservation Chemical case as of February 1985 are $2,028,608.63. At eight and three-eighths percent interest, the present value for 30 years' operation of the government's preferred remedy in that case is $29,522,000.00. Thus, government expenditures amount to approximately seven percent of projected cleanup costs.

In a motion filed by a third party defendant, pre-trial costs for third party defendants in the Conservation Chemical case were estimated at $4,816,000 to $11,682,000. These speculative, unverifiable estimates range from 16 to 40 percent of projected cleanup costs for the government's preferred remedy. The underlying premise of the question - that pre-trial litigation costs will exceed projected cleanup costs - is correct if at all only in relation to the costs of certain remedies that have been proposed by the defendants and which the government believes are not adequate.

Moreover, the high litigation costs associated with this case are due largely to the actions of the defendants, not the government's conduct. In this case, the government sued a limited number of parties for complete cleanup of the site under the theory of joint and several liability. The government determined that the parties sued are responsible for at least 80 percent of the waste by volume at the site, and for the most hazardous waste at the site. As you know, the CERCLA enforcement provisions, Sections 106 and 107, do not prevent PRPs that are defendants from impleading others as third party defendants. While we agree that contribution actions, following the government's case, may be appropriate, impleading numerous third parties has been used by some PRPs as a strategy to delay the resolution of the government's suit in which they are named as defendants. This strategy increases litigation costs by forcing the smaller generators to participate in the government's litigation even though their ultimate share is too small to warrant such costly participation. As a result many third party defendants have complained to Congress.

Section 202 of S.51 (section 202 of S.494) would amend section 107 of CERCLA to clarify that contribution actions may be heard only after a judgment or good faith settlement is reached. This amendment would certainly expedite and reduce costs in such cases as Conservation Chemical.

Furthermore, the Agency's current policy of negotiating for the remedial investigation and feasibility study prior to initiating litigation and initiating such litigation only after the conclusion of the RI/FS and identification of the appropriate remedy will conserve resources of all parties. It is estimated that over a year of fruitless negotiation on identification of the appropriate remedy in Conservation Chemical could have been saved under this policy.

b) How many other cases have or will involve transaction costs approaching the level of clean-up costs? What is the usual ratio of transaction costs to clean-up costs to date and what do you anticipate in the future?

The Agency has not yet conducted any studies or analyses of comparative legal and other costs in the CERCLA litigation context, and cannot provide a usual ratio of such costs to cleanup costs. However, the Agency believes that its enforcement related costs are not a significant portion of the total response costs. The Agency is not aware of any cases in which government's enforcement costs approach the level of cleanup costs. With regard to the legal costs of defendants, the Agency lacks sufficient data to formulate an answer. In all events, however, conclusions should never be drawn from a single case. The government may be forced to litigate in certain cases when the parties will not settle, or when for precedential reasons the government must pursue the case. Any evaluation of legal costs should take into account the entire enforcement program.

c. Some suggest that the transaction costs of such cases will decline as greater experience with this type of litigation is achieved. Do you accept this argument? If so, please outline specific areas where you anticipate declines in such costs. Also, outline specifically the experience since the enactment of Superfund, showing any areas where transaction costs are declining.

For the reasons noted, it seems quite likely that enforcement costs will decline as experience increases. In particular, less litigation will be needed concerning the specific legal rules governing responsible party liability, for these rules are now relatively well established. Litigation costs, however, are but a small percentage of total cleanup costs. Certain costs, such as contract management and technical support, are more fixed than variable because they are necessary expenditures whether a case is litigated or resolved in an alternative manner. As noted, however, the Agency has not yet conducted any definitive studies or analyses of transaction costs.

d. Some suggest that the transaction costs are high because of concern over joint and several liability and the potential for ruin that even some small contributors might face at a given time. Please respond to this industry argument.

EPA is not aware of any evidence that supports the suggestion that transaction costs are increased by the existence of joint and several liability under Superfund. As EPA and the Justice Department have noted in the past, joint and several liability facilitates the settlement of Superfund cleanup litigation and provides an incentive for private parties to cooperate among themselves in settling such lawsuits. Accordingly, joint and several liability, if anything, reduces transaction costs.

While some have suggested alternative schemes of liability, the government is concerned that an alternative scheme of liability is likely to result in a more complex, resource intensive, and costly enforcement process for both the government and responsible parties. For example, the delay associated with apportioning costs in advance of judgment or settlement is potentially so great that the government may be forced to undertake the cleanup itself in most instances. This is because each party at a multi-party site would have both the ability and incentives to litigate its own separate share of liability against the Government.

In addition, the current scheme of joint and several liability encourages responsible parties to negotiate and coalesce and to develop consensus positions. Many responsible parties currently prefer to settle with the government for cleanup or costs, due in part to the existing potential joint and several liability. Those settlements may not occur if responsible parties are confident of limited liability in a Section 106 or cost recovery action.

Moreover, an alternative liability scheme could place a tremendous burden on de minimis parties in regard to factual showings. De minimis contributors may not be able to afford the costs of collecting the data and evidence needed to establish their shares.

3) In your discussion of Superfund reauthorization, EPA has emphasized the need for rapid clean-up as a primary goal. You have also suggested that anything that slows clean-up, no matter how well-intended, could inadvertently increase the risk to public health that led the nation to decide to undertake the Superfund in the first place. Please discuss any studies you have on the matter of increased public health risk from delay of clean-up, or any other information supporting your view. In particular we would be interested in any quantitative evaluations of the matter.

EPA has not done studies of the increased public health risks due to delays in Superfund cleanup activities. However, we realize that if delays in removal or remedial activities at certain sites do occur, it could potentially result in increased public health risks.

EPA's highest priority is to respond to threats to public health and the environment posed by uncontrolled hazardous sites and spills of hazardous substances through our Superfund removal program. Early and expeditious removal actions by EPA at sites on the National Priorities List can reduce, by many months, exposure resulting from active releases, or avert exposure from potential releases in order to protect public health and the environment. Additionally, we perform removals at non-NPL sites to abate immediate threats from hazardous substances and pollutants or contaminants through surface cleanups and other quickly implemented response measures. In the remedial program, we are rapidly moving sites through the planning process to produce timely, good quality remedial investigations and feasibility studies, that will facilitate the design and construction phase. A discussion of EPA's plans for further streamlining the CERCLA program to facilitate more rapid cleanups is contained in the preamble to the proposed National Contingency Plan revisions published in the Federal Register on Febuary 12, 1985, on pages 5863-5870.

4) How long does it take to litigate to judgment and to actual recovery of final judgment in cost recovery cases? Give examples related to actual cases?

Discussion of Superfund site cleanup activity and associated cost recovery of those cleanup costs should distinguish between NPL and non-NPL site activity.

Non-NPL site cleanup generally refers to emergency or immediate removal actions which are authorized under section 106 of CERCLA. EPA maintains, as a general policy, that cost recovery actions for these removal actions are to be initiated after the emergency response action is completed and total site costs can be calculated.

Recovery of the cost of response activity at NPL sites is somewhat more complex. Responsible parties have an opportunity to participate in or conduct the RI/FS, leading to the choice of remedy, subject to Agency oversight. It is EPA policy not to initiate cost recovery action or negotiations with responsible parties to undertake the actual site cleanup until a Remedial Investigation/Feasibility Study (RI/FS) has been completed. After the RI/FS has been completed, negotiations for Remedial Design/Remedial Action (RD/RA) will be initiated. These negotiations would include the recovery of costs incurred at the site to date. If negotiations are successful, the Fund will be reimbursed for costs incurred to date and the responsible parties will undertake the RD/RA. If negotiations are unsuccessful, Fund financed RD/RA would proceed. In the meantime a civil action would be pursued by the Agency to recover costs incurred at the site.

The following chart depicts, for several cost recovery actions, the length of time between completion of the removal action, referral of the case from the Regional Office to EPA Headquarter and settlement of the case. Virtually all Superfund cases eventually settle.

SITE	REMOVAL COMPLETION	REFERRAL TO HQ	SETTLEMENT
Diamond Alkali 1	6/83	9/84	1/85
Lenoir	10/82	3/83	4/84
Dreyfus St.	10/81	4/82	1/85
Plastifax	6/82	9/82	6/84
Nickel Solution	4/83	9/83	7/84
American Surplus	4/82	9/82	6/84
Petro Processors2 (NPL)	6/81	6/82	2/84
A & F (Greenup)3 (NPL)	5/82	1/83	6/84

1. Sampling initiated. 2. Site inspection. 3. First Fund removal completed.

5) What is the ratio between EPA/DOJ legal and administrative costs and actual amounts ultimately recovered in cost-recovery cases?

Each year, DOJ receives from the Fund a specified sum to conduct Superfund litigation. DOJ receives this funding pursuant to an interagency agreement with EPA. The following amounts have been billed to the Fund pursuant to these agreements:

FY 82: $ 1.168 million
FY 83: 2.654 million
FY 84: 3.071 million
FY 85: 5.020 million (agreed to be transfered to the Department)

As the cost recovery and injunction statistics set forth below reveal, our estimated recoveries from litigation have been substantially greater than the amounts received from the Fund for litigation. Our combined recoveries under CERCLA sections 106 and 107 and RCRA in terms of dollar amounts and the estimated value of the removal and remedial actions achieved through judgments and consent decrees have been as follows:

FY 82: $57 million
FY 83: 62 million
FY 84: 119 million

These amounts, totalling almost $240 million, clearly indicate the overall cost-effectiveness of the Administration's enforcement program and the success of the enforcement program in providing an incentive for responsible parties to reach agreement with the United States on their potential liability under CERCLA and RCRA.

The following chart presents a sampling of cost recovery settlements with the amount recovered, the amount of administrative costs incurred and the amount of DOJ litigation support costs. For the purpose of this chart, administrative costs include all EPA payroll charged to the site (both technical and legal), and all travel charged to the site.

SITE	AMOUNT RECOVERED	ADMINISTRATIVE COSTS	DOJ COSTS	COST AS A % OF RECOVERY
Diamond Alkali	$1,835,600.00	$36,148.49	-	1.9%
Lenoir	113,000.00	18,927.33	6,121	22%
Dreyfuss Street	259,600.00	15,749.76	27,770	16%
Plastifax	226,369.00	16,381.72	3,338	8%
Nickel	199,500.00	23,917.23	1,841	12%
American Surplus	138,400.00	22,378.34	7,293	21%
Petro Processors	600,000.00	73,524.79	183,884	.5%
	(50,000,000.00	remedy to be conducted by defendants)		
A&F (Greenup)	490,000.00	50,499.86	195,646	5.5%
	(4,000,000.00	remedy to be conducted by defendants)		

6) What is the time frame that you envision, in cost-recovery actions, between initiation of litigation to the actual beginning of cleanup in the coming years? How does this compare with the experience to date?

The time frame for enforcement action is set out on the following chart. We currently estimate approximately six months for case development, and a year to two years for litigation, depending on the complexity of the litigation.

Litigation in some cases to date has taken longer than these time frames contemplate. This can be attributed to the fact that, for many early CERCLA and RCRA 7003 cases, litigation was initiated before remedial investigations and feasibility studies were conducted. The government sued responsible parties before the appropriate remedy had been identified, thus increasing the complexity of the issues potentially subject to litigation. In addition, many issues were negotiated in the course of litigation. Under the current process, there are a number of opportunities for negotiations with responsible parties prior to the initiation of litigation. These changes shorten the time needed for litigation, and increase the likelihood that negotiations will be successful, thus reducing the need for litigation.

In cost recovery actions, cleanup is initiated before litigation. Agency policy is to initiate action to recover costs as soon as practicable after the Agency chooses the appropriate remedy for the site and develops its Record of Decision.

I	II	III	IV	V	VI	VII
PRELIMINARY ASSESSMENT/ SITE INVESTIGATION	NPL LISTING	RESPONSIBLE PARTY SEARCH	NOTICE LETTER ISSUANCE	RI/FS DEVELOPMENT	NDD/DRAFT ROD	RECORD OF DECISION ON REMEDY
	60 days public comment	ASAP after it is determined that site will be proposed	At least 60 days before RI/FS is obligated	Approx. 18 months	60-120 days	

VIII	IX	X	XI
CASE DEVELOPMENT	LITIGATION	DESIGN	CONSTRUCTION
6 months	1/2 cases: settle 1/4 cases: 1 year 1/4 cases: 2 years	9 months	1 year

7) How many National Priority List sites involve cost recovery litigation?

Case referred to EPA headquarters:	4 NPL
Cases referred to DOJ:	17
Cases Filed:	49
TOTAL	70 NPL sites

8) Please provide specific numbers (and any accompanying assumptions) of the comparative cost if EPA provided money immediately for cleanup at remedial sites as soon as the cleanup plans were complete, rather than after litigation. Assume for this purpose that there are no costs for litigation whatsoever. Also provide information as to the amount of time that would be saved.

Specific numbers on comparative costs are not available. Generally, the remedy for Fund-financed cleanup is the same as the remedy for private party cleanup. Therefore, the costs should be the same, except as adjusted for inflation and for the costs of litigation. We note that if a Fund-financed remedy is initiated, litigation costs will eventually be incurred in a cost recovery action.

The time potentially saved by proceeding with Fund-financed cleanup varies with the complexity of the litigation. The Agency currently assumes six months for case preparation, and one to two years for litigation. We anticipate that many of these cases will be settled before litigation proceeds to completion. More details on the timing of the enforcement process are set out in the answer to question 6.

9) Please suggest any areas of improvement in the CERCLA statute or its implementation that could/will lead to reduced transaction costs. Also state what EPA believes to be an "acceptable" level of transaction costs in this area, given the other resource needs of the Agency and the nation. Please be specific in your answers and assumptions.

As set forth in the section-by-section analysis accompanying the Administration's bill, the Administration proposed several changes to the statute which the Agency believes will minimize legal costs. One is the contribution amendment in S.51. and S.494 Section 202 (Section 202 of S.494) clarifies the existing law governing liability of potentially responsible parties in three respects:

- Parties found liable under section 106 or 107 will have an express right of contribution, allowing them to sue other potentially responsible parties to recover a portion of costs paid by the liable parties. While this may lead to some litigation, it is the Agency's view that this provision will encourage settlement by putting all parties on notice, whether sued by the government or not, that they may be held liable for their share of the cleanup or cleanup costs.
- Parties who reach a good faith settlement with the government are not liable for contribution claims from other liable parties. This provision will clearly limit litigation, by ensuring those who settle with the government that they are protected from additional litigation on cleanup costs.
- Contribution actions may be heard only after a judgment or settlement in good faith is reached with the government. This should limit the litigation costs of those parties not sued by the government and focus the government's case on remedy rather than liability. It is also the government's view that by postponing the hearing on contribution until after the government's case, the parties will settle without having to litigate.

In short, it is the government's view that these provisions will limit litigation costs by:

1. providing a greater degree of finality to settlements reached between EPA and responsible parties; and
2. expediting private party cleanup through simplification of the process of litigating imminent hazard enforcement actions.

The Agency also believes, as noted above, that the provision relating to record review of remedial decisions will help to minimize legal costs, by focusing the court's and the parties' attention on the facts before the Agency at the time of the remedial decision.

Finally, the Agency is considering additional proposals to further encourage settlements and thereby limit legal costs. Indeed, it is the Agency's view that the debate on joint and several liability is misfocused. The real issue is how to improve the Agency's settlement flexibility to take care of many of the concerns that are now incorrectly aimed at joint and several liability. In this regard, the Agency is considering language that will enable the Agency to settle small cost recovery cases outside of a litigation context.

The Agency is also considering proposals that would give the Agency authority to use Fund money to make up certain differences in settlements. As soon as these proposals are finalized they will be forwarded to you and the Committee.

10) What is the status of EPA's study of the MITRE model and its "bias" toward mining site inclusion on the NPL that some have suggested? What are the specific purposes of the study? What conclusions will the EPA be better able to make as a result? What are the dates and deadlines it is on?

As you may know, EPA is currently reviewing the assumptions and technical data relevant to the Hazard Ranking System (HRS) in light of the data collected by the Superfund program over the last several years. In addition, we have carefully reviewed the report prepared by TRC Environmental Consultants for the American Mining Congress (AMC) which asserts that the HRS is biased against mining sites. The Agency's findings regarding the TRC/AMC report are that the report contains a number of errors, that the statistical techniques used were incorrectly applied, and that their findings are unsupported within the report. An example would be their contention that releases at mining sites are more easily observable than at other sites, when, in either case the observed releases are based on field sampling and laboratory analyses. Expressed differently, the "findings" are simply opinions lacking any scientific or technical basis as far as we can discern. EPA's detailed critique of that report is undergoing final Agency review, and we should be able to furnish you a copy shortly.

While we would reject the contention that the HRS is unfairly placing mining sites on the NPL, we believe that it may be possible to improve the way the HRS handles mining and non-mining sites. With five years of experience now in site investigations, the Agency now has a large body of data to use in reviewing the scientific basis for the HRS. Examples of the areas we are examining include the potential for air releases (the HRS currently only addresses observed releases for air), aquatic food chain contamination, geochemical attenuation of pollutants in ground water, and mechanisms for considering the concentrations of hazardous substances involved. What we are doing is the basic scientific and technical analyses that are prerequisites to proposing changes in the HRS, and we expect to conclude some of those analyses by the end of summer. At that time we will decide whether revision of the HRS is warranted in light of the costs (e.g., additional data collection costs) and potential benefits of such revisions.

Senator SYMMS. If panel 4 would please come to the table, we will commence. May we please have order in the room?

It would be the Chair's intention to try to complete the hearing this morning. As is often the case on an issue that is as important and controversial and has as diverse points of view as we have heard here this morning, it is difficult to rush through some of these issues. However, the Chair must note that with the exodus of members of the committee, we might be able to go a little faster than we have. What I would say to the panel is that all of your statements will be made a part of the record, and how many of the witnesses here at the table are intending to make a presentation?

[Show of hands.]

So, you all are. Five of you? If you could keep it to 5 minutes apiece, I hope you can do that. That would take us to 1:25 and then we will have some questions, so the sooner we get started the better.

I guess Mr. Chip Neumeyer, president of the Amaral and Neumeyer Inc., McKees Rocks, PA, would you please go right ahead.

STATEMENT OF CHIP NEUMEYER, PRESIDENT, AMARAL & NEUMEYER, INC.

Mr. NEUMEYER. Thank you. I am Fred C. Neumeyer, president of Amaral & Neumeyer, Inc., an asbestos abatement company located in Pittsburgh, PA, since 1979.

This is to satisfy your request, dated March 29, 1985, to provide testimony addressing availability, cost, and coverage of insurance for asbestos liability which can arise under public laws.

Item one, availability, the Great American Surplus Lines and the New York Insurance Exchange. These are the only companies that we know of that are writing asbestos general liability, and from what we hear from other contractors, the New York Insurance Exchange is no longer writing.

In 1979, when Amaral and Neumeyer was formed, there was no such thing as asbestos insurance coverage. Because the insurance companies were unable to foresee the future problems that would occur due to asbestos, they offered insurance under a general liability program. In 1981, we lost our insurance coverage because the insurance industry began to feel uneasy with asbestos. We were able to be picked up by the standard market by smaller insurance carriers, but our policies were never renewed due to the asbestos.

We learned in June 1984, that our current policy with the American States Insurance Co. would not be renewed in August. Since June 1984, we were forced to constantly search for insurance coverage to the extent that it became a full-time job for our controller.

In August, we were picked up by Motorists Mutual when our old policy lapsed only to be cancelled in November. After agents and brokers exhausted the standard insurance markets available, and also the specialty surplus markets, we were able to locate one market.

Since there were so few companies willing to write asbestos liability, we had little choice but to accept the very costly, inadequate coverage of the Great American Surplus Lines.

Item two, cost, 20 percent of gross receipts from asbestos abatement work. Our premium cost for $600,000 in receipts is $140,898, and of that amount, $30,900 was required initially for deposit. We estimate our sale in 1985 will be around $2 to $2.5 million which would mean an additional $380,000 in premiums. These amounts do not include the time and expense incurred by our corporation involved in the full-time search, since June, for insurance coverage.

Although we are being financially and environmentally responsible by buying this coverage and with each bid we notify building owners of the possible lack of proper coverage by some contractors, the project is often still awarded to a nonqualified contractor simply due to the cost difference. We are forced to compete on a daily basis against contractors that are either unaware of the insurance problem or are unwilling to insure themselves properly and initially absorb the high cost. These contractors are budgeting into their estimates 2 to 3 percent while we must add 20 percent for general liability alone. This is not only causing us to lose work, but it is allowing unqualified contractors to perform this specialized service.

Item three, coverage, claims made policy with a 12-month discovery period. This form of insurance does not offer coverage for any asbestos-related illness that may be contracted while the policy is in force, and the illness is not detected until after the 12-month discovery period. This would not be a problem if we could obtain guaranteed ongoing insurance coverage from this same carrier. But because asbestos abatement is a relatively new field, the insurance industry has no past loss experience with which to determine the risk factor.

Thus, all but a few companies have quit writing asbestos liability insurance. If the trend of the insurance companies is not to write this liability, we feel that even minimal coverage offered now will no longer be available. After approximately 2 years of intensive struggle to obtain adequate liability insurance, our fears seem justified.

Senator SYMMS. Thank you very much. That is a rather startling statement in terms of the fact that you are paying 20 percent of your gross, if I heard you correctly, 20 percent of your gross for asbestos abatement work.

Mr. NEUMEYER. Yes, that is true.

Senator SYMMS. The next witness is Mr. Max Clay. Mr. Clay?

STATEMENT OF MAX CLAY, PRESIDENT, THE PLANNING CORP., VIENNA, VA

Mr. CLAY. Thank you.

My name is Max Clay. I am president of the Planning Corp., an independent insurance agency that specializes in the placement of pollution liability insurance for businesses which have need for this insurance. I hope today that I have a positive statement to make instead of the negative ones we have heard.

Since 1982, our agency has been the major producer of pollution liability insurance for petroleum marketers. Today, we have pollution liability insurance in force covering more than 15,000 retail gasoline outlets, several hundred petroleum bulk storage facilities, and a large number of miscellaneous farm and commercial storage tanks containing petroleum.

The purpose of my testimony is to distinguish for members of the committee the difference between pollution liability insurance for nonpetroleum and petroleum related risks. As the committee has heard from other witnesses, the pollution liability insurance market for nonpetroleum exposures today is practically nonexistent. However, pollution insurance currently is available for petroleum related risks. The coverage is comprehensive, limits of liability are adequate, and pricing is equitable and competitive.

There are a number of important reasons why releases of petroleum into the environment remain insurable risks. The crucial factor from the insurance companies viewpoint is the petroleum exclusion in Superfund. It is likely that the pollution liability insurance market for petroleum related risks will disappear if the petroleum exclusion is removed or limited by Congress during the reauthorization of Superfund. Moreover, the continued existence of pollution policies on petroleum related risks is essential to the success of the financial responsibility provisions in the recently enacted amendments to RCRA relating to underground storage tanks.

A tremendous upheaval has occurred over the last few months in the pollution liability insurance market. With the recent withdrawal of two companies that were offering this coverage, we believe that there are only one or two insurance companies left in the United States which are willing to consider insuring nonpetroleum pollution exposures.

Lack of adequate pollution liability insurance capacity for such exposure is the result of a number of factors including poor loss experience, a series of court rulings that have expanded insurance coverage beyond that contemplated when the policies were underwritten, and environmental statutes and regulations, as well as pending legislation which acts to increase an insurance company's liability. The courts' interpretations of Superfund's liability provision as strict joint and several and proposals on Capitol Hill for a Federal cause of action in the pending Superfund reauthorization legislation are examples of this last factor.

In addition, a major crisis is occurring in the general liability insurance market. Until this year, most general liability policies provided coverage for pollution losses which were sudden and accidental. You heard some comments on this before. The courts have interpreted those policies to cover both sudden and gradual losses. As a result, the general liability carriers are pulling back and removing all pollution from their general liability contracts.

So, the current situation is that, just as the underwriters who provided gradual pollution liability are withdrawing from the marketplace, sudden and accidental pollution availability is disappearing also. You have a situation where most businesses which either need or want insurance coverage for pollution losses are out of luck. The coverage is simply not there.

Despite the turmoil in the pollution liability insurance market, there is one bright spot, petroleum related risks. Pollution liability insurance, as I said, is currently available to most petroleum marketers.

The obvious question is why, given the miserable condition of the pollution liability insurance market, can petroleum marketers obtain insurance on pollution losses when chemical companies, landfill operators, municipalities, et cetera, cannot. There are a number of important reasons why releases of petroleum products into the environment remain insurable risks.

Petroleum releases, unlike spills or discharges from many Superfund hazardous substances, are easily detectable because of taste and smell. When a person's water supply is contaminated by a gasoline leak from an underground storage tank, they are not likely to drink or bathe in the water. As a matter of fact, they are very unlikely to do so.

My agency has had nearly 3 years of claims experience with underground petroleum tank leaks. Unlike claims arising from Superfund or RCRA sites, claims for petroleum losses are nearly exclusively for property damage. Personal injury claims are a rarity. The difference is extremely important to pollution liability underwriters.

Moreover, the typical claim for an underground petroleum storage tank is limited to cleanup costs. Because the release generally is confined to the area surrounding the tank, litigation is seldom required. While such claims are high in frequency, they tend to be low in severity. The normal cost for an underground petroleum storage tank leak cleanup ranges from $10,000 to $80,000. The average cost, based on our 3 year's of experience, is $55,000.

Senator Symms. Can you go ahead and summarize now?

Mr. Clay. Yes, I can.

In summary, despite the scarcity of pollution liability insurance for nonpetroleum exposures, insurance companies today will write comprehensive policies for pollution on petroleum related risks. They cover third party actions, and they would also cover required cleanup, both on and off the insured's sites.

Insurance companies' interest in cleaning up a spill quickly to avoid litigation and saves them money to do so.

The thrust of my testimony is that the health of the pollution insurance liability market for petroleum related risks is directly linked to the maintenance of the petroleum exclusion in Superfund. There is little that could possibly be gained by taking action that would severely restrict or eliminate an active and viable insurance market that is willing and able to fund the cleanup costs for an overwhelming majority of petroleum spills and replace such insurance coverage with Superfund that already suffers from a lack of resources, both human and financial.

Thank you.

Senator Symms. Thank you very much.

Mr. Poirot.

STATEMENT OF JAMES W. POIROT, CHAIRMAN, CH2M HILL, DENVER, CO

Mr. Poirot. Thank you, Mr. Chairman.

My name is Jim Poirot. I am chairman of the board of CH2M Hill, a multidiscipline, nationwide consulting and engineering firm. Our corporate offices are in Denver, CO.

I have with me today two other gentlemen, Mr. John Henningson, who is vice president of Malcolm Pirnie of Paramus, NJ, and also Paul Genecki who is vice president of Victor O. Schinnerer Associates and represents experts in the design professional liability insurance business.

Today, I am representing the American Consulting Engineers Council and also six other professional engineering associations who also share our views.

We have given you an advance statement of our concerns. I would like to briefly describe those and emphasize a few elements.

I believe Mr. Henningson and I are unique in this room in that we have actually been on a hazardous waste site and observed the pioneering activities of cleaning up hazardous waste and the risks that are involved in that process. We recognize that the reason——

Senator SYMMS. Of course, you realize that has never been a requirement for passing laws.

Mr. POIROT. I understand.

We also recognize, though, that the reason Congress enacted Superfund was to eliminate the tremendous risk to the public, and that this was a problem neither Congress nor those cleaning sites created. We, as you, I am sure, recognize that this cleanup effort must be accomplished with the highest quality possible and also in a very expeditious and efficient manner.

Before I address our quality concerns, it may be helpful to address who consulting engineers are and the important role they play in this process. We act as a bridge, in this case, between the Government and the cleanup contractor. Without the skills provided by the professional engineering firm, this implementation of a quality cleanup process could not occur. Let me describe briefly what we do in this bridge role.

We perform investigations. We sample the various chemicals in the underground aquifer, the soils, the geologic conditions. We prepare preliminary plans and study various alternatives that may provide a reasonable solution. We estimate the costs of these alternatives. We prepare final drawings and plans and specifications for the implementation of the approved solution. Finally, we observe the construction to help ensure that the plans and specifications are correctly followed during the cleanup process.

Essentially we are an extension of the Government staff. The Government is our client.

These are services that we provide every day on all of our projects. But the Hazardous Waste Cleanup Program is more complex with many more unknowns. We have less experience to draw upon than any previous Government program that we have been in. In many ways, this is a new business for consulting engineers. I might say I believe it is also a new business as far as insuring consulting engineers. It is certainly a new business for the insurance companies.

My firm, one of the largest environmental firms in our Nation, considers this program the most complex and risky business that we have ever been in. It is unlike designing buildings or bridges or sewage treatment plants where there are years of experience we can draw upon. Instead, we are dealing with something that we can't see, that is under the surface. The actual extent of the aquifer often cannot be established: the pollution migration cannot be determined exactly: and the chemical concentrations throughout the aquifer cannot be established exactly.

Let me review the risks I am speaking of. We perform alternative studies, and we study the technologies that exist today. Then, we recommend a solution. Generally, it is probably a conservative solution because many of the technologies are inadequately tested. Then, the many players, such as EPA, the States, and the Corps of Engineers, are involved in deciding the solution to be implemented.

Later, if someone is injured either during this process or after the cleanup is done, we are one of the targets for a lawsuit. It was earlier mentioned that the deep pockets seem to be the targets. In our case, we are just another deep pocket.

There is no perfect design. There is only a process of analyzing the several alternative solutions and determining the best solution for the site. We know there will be second guessing. Alternative technologies are being studied. In the future, in hindsight, another method other than the one chosen may be a better solution. Some of these methods don't exist today, but second guessing will result in the engineers as participants in the process surely being the targets for claims.

Again, neither the Congress nor the cleanup team created this problem. We now seek your understanding and assistance to include legislation reasonably protecting the engineers. They are willing to assume responsibilities for our acts within our financial insurable means, but to be very clear, if we cannot be insured or indemnified, we will not be able to provide the vital role required to implement the cleanup process.

To give you an example——

Senator SYMMS. Can you summarize your statement, please?

Mr. POIROT. Yes.

To give you an example, CH2M Hill this year has had its insurance limits reduced to one-quarter of what it was a year ago. Also, we are told that we will not be able to be insured for hazardous waste activities in 1986.

Mr. Henningson's firm is in a similar position, and other companies have similar situations.

We want to compliment the committee for including in S. 51, under section 124, the indemnity provision that exists today. It is a good start. However, we feel it should go further. The indemnity provision should be made mandatory rather than discretionary, and there must be a means to provide funding sources.

Thank you, Mr. Chairman.

Senator SYMMS. Thank you very much for an excellent statement.

Mr. Farrell.

STATEMENT OF BYRON FARRELL, HELMKAMP CONSTRUCTION CO., ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Mr. FARRELL. Yes, sir, Mr. Chairman. I am Byron Farrell, president of Helmkamp Construction Co. of Wood River, IL. That is right across the Mississippi River from St. Louis. I am speaking on behalf of my company and the Associated General Contractors of America.

AGC supports the efforts of the Federal Government to fund the hazardous waste cleanup program and to extend the existing Superfund Program for 5 more years at an increased level. We are very pleased to see that the committee has recognized one of the primary obstacles of increased competition for cleanup contracts and supports the thrust of the provisions of the Senate bill to indemnify contractors against third party liability which is not caused by the contractor's negligence.

Safety and economy are not competing goals in Superfund cleanups but, in fact, compliment one another. A prime method of ensuring that the goals of safety and economy are achieved is to encourage as many qualified contractors as possible to become actively involved in the program.

Although the hazardous waste cleanup program has the potential for being a very promising market, the associated liabilities and risks are so extreme that many contractors are unwilling to enter the market. The single largest risk emanates from the potential of third party liability claims.

Construction contractors who are considering entering the hazardous waste cleanup market have great concern that they may be placed in a position of being the only identifiable party connected with a hazardous waste site and that, consequently, they may be held responsible for damage to health resulting from the hazardous waste site. The risk of third party liability is compounded because contractors are, as of now, unable to obtain adequate insurance coverage for their risks. I don't need to dwell on that; I think that has been made perfectly clear this morning.

Insurance underwriters do not offer environmental impairment liability insurance, the type of coverage we need for cleanup contracts on Superfund sites. AGC commends the committee for recognizing this liability problem in their Senate bill.

The indemnification provision is a major step toward providing the necessary protection. However, we believe that some modification in the provisions are necessary to fully ensure that the protection the committee intended is, in fact, realized.

The first suggested modification entails the need for a specified reserve fund to pay any claims. The Antideficiency Act of the U.S. Government apparently nullifies a Federal Government indemnification provision if a reserve of funds to cover the contingencies are not specifically available.

AGC also recommends that the provision be revised to require that the Administrator offer indemnification to all response action contracts under the provision. Under the current discretionary language, a contractor would be placed in the position of negotiating with EPA for indemnification on each contract after the contract has been bid. The uncertainty as to whether the discretionary indemnification will be granted will wreak havoc in the bidding process. The contractor must have the certainty when he is bidding the contract that third party liabilities will be indemnified so that he is able to make an adequate assessment of insurance costs and risk factors when preparing the bid.

It is anticipated that in order to protect its own interests, the Federal Government will indeed become involved in defending the contractor against third party claims. AGC recommends that this be specified in the legislation to be certain that the Government will, in fact, be involved in the contractor's defense.

The cost of litigation could very well put contractors out of business even if eventually exonerated by the time a legal ruling is rendered. To assure that this will not happen, the Federal Government must participate as a partner in litigation involving the cleanup contractor's actions in compliance with the contract.

We urge expeditious modification to S. 51 as outlined to ensure increased competition and lower costs of expanding the hazardous waste cleanup program.

I can give you three examples of hazardous waste sites that my firm bid on, and all three sites are very similar in nature. On one site, the cost of work was $250,000. Our bid was $750,000 because there was $0.5 million for claims made insurance. On the next bid, the cost of the work was $200,000, and our bid was $1.2 million because of the cost of insurance. This site involved dioxin. Neither of these sites has been cleaned up. They were abandoned and put on the shelf for further advisement.

One other site, the third site, and this was for private industry, the cost of the site was $225,000 as far as cleanup. Our bid was $700,000, again because of insurance.

The only site cleanup that is being accomplished now is by self-insured hazardous waste disposal contractors or by small contractors that aren't familiar or aren't sophisticated enough on their insurance coverage or that their own local insurance agent is unaware that they are not covered or chooses not to make them aware of that. It is a distinct problem in the construction industry, and I thank you for the opportunity to make you aware of this.

Senator SYMMS. Thank you very much. Those are startling figures. You say that on one job, the cost of cleanup was $200,000. The cost of liability insurance was $1 million?

Mr. FARRELL. Yes, sir, because it involved dioxin. The insurance companies didn't know what to charge, and we didn't know where to put our liability limit. So, that is the fact.

Senator SYMMS. That is incredible. We do have a problem. I think that understates it to say we have a problem.

The next witness is Mr. Bruce Parker.

STATEMENT OF BRUCE PARKER, COUNSEL, NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

Mr. PARKER. Thank you, Mr. Chairman.

My name is Bruce Parker. I am the general counsel for the National Solid Wastes Management Association. Mr. Ian Matheson who is a risk manager for one of our largest companies has submitted testimony for the record. Unfortunately, he couldn't be here today, so I am going to take the opportunity to summarize his remarks, and I assure you I will be very, very brief.

There is a legitimate crisis today because of the virtual absence of any insurance market to provide environmental impairment liability insurance. Effective January 1, 1985, virtually all major property/casualty insurers were confronted with absolute pollution exclusion within their treaty reinsurance renewals, thereby foreclosing pollution coverage to most policyholders even before the anticipated January 1, 1986, introduction of the revised insurance services office comprehensive general liability form containing an absolute prohibition exclusion.

You are probably also aware of the fact that section 30 of the Federal Motor Carrier Act of 1980 requires specified limits for financial responsibility for environmental restoration liability, the limits of which range from $1 to $5 million depending upon the type of transportation and designation of the hazardous substance or materials transported by the motor carrier. I have been informed by the risk managers of several companies that this type of required insurance coverage is also on the endangered species list.

As commercial waste treatment and disposal firms frantically search to find coverage as their policies come up for renewal, they are staring at the November 8, 1985, RCRA deadline terminating interim status unless the facility owner certifies, among other things, compliance with the financial responsibility and insurance requirements under RCRA.

Candidly, and this is the nub of my testimony now, satisfying these minimum regulatory requirements is not the principal problem resulting from this insurance crunch. Rather, it is the serious inability of the commercial waste industry to provide for insurance protection against a catastrophic loss due to environmental occurrences. Plain and simple, our companies are talking about preservation of assets and are being forced to make hard business decisions regarding future capital commitments to certain areas of operation in the absence of an available and financially competitive insurance market.

It is entirely possible that this situation could diminish the availability of professional waste management services with a resulting increase in public and environmental risk. As you know, 84 percent of U.S. companies generating hazardous wastes, and that is not including small quantity generators which have recently been brought into the scheme, are dependent for their waste management services on commercial companies. These companies as well as the small quantity generators, to say nothing of the solid waste generators and haulers, are those whose entire existence now hangs in the balance.

Public companies may be particularly vulnerable because they would be effectively required to transfer the risk of environmental liabilities from insurers to their shareholders, the effect of which could impede the availabilities of money necessary for usual operations. The larger companies are presently those most able to meet the financial responsibility requirements of the law and provide a substantial share of our national commercial treatment and disposal capacity.

The evaporation of EIL coverage not only threatens our RCRA Program but the cleanup program of Superfund as well. The liabilities assumed by cleanup contractors and the facilities which may receive spills or excavations are equally as uninsurable as those of RCRA, treatment, storage, and disposal facilities.

You have heard this morning testimony on the contributing causes of the problem, and I think the record is fully substantiated on this aspect. Thus, I will not belabor it.

Just let me conclude by saying that, or asking the question, so where does all this lead? It is clear that solutions to this insurance crisis will not be easy to reach. I think that is sure. We have made our concerns and views known to appropriate officials at U.S. EPA, but today's congressional inquiry marks the beginning of the public process of attempting to separate fact from fiction regarding the causes of the current insurance crisis. Most important, this inquiry must examine all conceivable solutions to the problem and the individual or interactive roles that commercial waste service firms, other regulated firms, the insurance industry, and government can and should play in resolving this problem.

Thank you.

Senator SYMMS. Thank you very much.

Our last witness is Mr. Zimmer. Mr. Zimmer, please go right ahead.

STATEMENT OF STEPHEN C. ZIMMER, DIRECTOR OF INSURANCE PROGRAMS, SYSTECH, XENIA, OH

Mr. ZIMMER. Mr. Chairman and members of the committee I am Stephen C. Zimmer, vice president of finance for SYSTECH Corp. With me today is Mr. Michael Mullen of Crowell & Moring.

I am today testifying on behalf of the Hazardous Waste Treatment Council. This is a national association of treatment-oriented firms in the hazardous waste industry.

SYSTECH Corp. itself is a small company which provides industry hazardous waste disposal services through incineration.

The reason I am here today to testify is that even though we are a disposal firm, we are seeing a significant problem on the horizon relative to obtaining and retaining insurance. As was mentioned earlier this morning by the insurance industry, even though we provide a service wherein the material is destroyed and there is no long-term liability, they do not distinguish us from the common, as the term was used this morning, dump. Because of this attitude, we may face a crisis in the very near future. Through the Hazardous Waste Treatment Council we would like to have the committee listen to the comments that we will provide today which are presented in more detail in the written testimony. The reality of the situation is we may be confronted with the fact that we don't have insurance, either in the sudden and accidental pollution area or the nonsudden and accidental pollution area someday in the near future.

Through the Hazardous Waste Treatment Council, we are taking steps to provide our members with the ability to cover their pollution insurance risks. To this end, we are not petitioning for direct government intervention at this time. We feel, as a group, we can respond to our member's needs, but there may be a couple of tools that the Government could provide to help us accomplish this task.

We are currently, through the association, looking at going to the insurance industry as a group, and try to explain to them the difference between us and the treatment and landfill. That is, we are disposal and treatment companies, not landfill companies. Hopefully they will understand that there is a difference between us and the land disposal companies and be willing to write pollution insurance for our member treatment companies.

If this doesn't succeed, we will have to then look at the possibiility of establishing our own captive insurance company. To accomplish this, we feel there are some things that the committee should consider.

One of them that would aid us is to consider amending the Risk Retention Act. I would like to read this suggestion from the written testimony.

It says,

> The committee should propose amendments to the Risk Retention Act to allow companies to pool their pollution liability risk and set up self-insured risk retention groups. In 1981, Congress enacted the Product Liability Risk Retention Act, 15 U.S.C. Section 3901 et seq, which allows a group of companies to self-insure their product liability risk.

We look to Congress as maybe extending this to a special situation where we have product liability or, I am sorry, not product liability but pollution liability.

> Several States, including Colorado and Delaware, Vermont, and Virginia have passed laws for the licensing of self-insured groups called captive insurance companies. The Vermont law is notable because it makes specific reference to the Risk Retention Act. Under Vermont law, which is attached to our document, a company can qualify for a license as an industrial insured if it meets certain requirements.

This is one tool that, though there would not be direct Government intervention, would assist the industry in obtaining its own pollution insurance through a captive insurance company.

Another item that we would like to put forth today is that our group believes that the joint, strict, and several liability issue relative to Superfund should be maintained relative to entities who have disposed of material at these sites. We, however, don't believe that this responsibility should be put upon the entities who are vested with a responsibility of cleaning up these sites.

As a final point, we also believe that with the November 8 deadline coming up, we don't believe that RCRA should be reopened. We believe that if the November 8 deadline places a burden on industry, then industry ought to be allowed a compliance schedule, that is, if people have tried to obtain pollution insurance and cannot obtain it, then they should be given a compliance schedule. But for the industries who have not even tried to comply, then the November 8 deadline should be final.

I thank you for this opportunity to present our views.

Senator SYMMS. Thank you very much.

Mr. Zimmer, out of the large number of insurers, how many currently write insurance covering risks or potential liability of these firms for Superfund activities? Can you answer that?

Mr. ZIMMER. I am not in a position, but if we could we would respond to that in writing. Maybe somebody else.

Senator SYMMS. Is Mr. Genecki here?

Mr. GENECKI. Yes.

Senator SYMMS. Can you answer that question? How many firms specialize in this, actually write insurance, out of the thousands of insurance companies?

Mr. GENECKI. I believe there are about eight, Senator, and that is probably the highest point in the last 15 years.

Senator SYMMS. Out of how many insurance companies?

Mr. GENECKI. Probably several thousand.

Senator SYMMS. So, then it is a specialized field?

Mr. GENECKI. Indeed. It is a very specialized field.

Senator SYMMS. You say there are eight companies? Who are you with, Mr. Genecki?

Mr. GENECKI. I am with Victor O. Schinnerer Co. which is the underwriting manager for the special liability program that has been continuously commended by the professionals assigned in the last 28 years, so we have been in the business as long as there has been professional liability available.

Senator SYMMS. OK, well, thank you.

I have some more questions I am going to submit in writing to you, sir.

I have three or four questions I want to submit to Mr. Farrell. I will submit them to you and you can answer them in writing. With respect to the competition aspect, and, if you can give me a quick answer on this, do you support an open competition requirement in the Superfund?

Mr. FARRELL. Yes; definitely.

Senator SYMMS. We have a highly controversial subject in my State with the Federal timber purchases and the small business set-aside. Half of my friends are for the small business set-aside and half of them are against it, it depends on who they work for and whether they qualify. However, that is not quite the problem I am asking about here. Is there a problem here with people coming in and bidding on some of these jobs that are not concerned about it, such as the case that has happened with respect to offshore oil drilling?

Mr. FARRELL. There are people that choose not to look at their liability, their third party liability, on down the road. It is damn the torpedoes; full speed ahead. It has been said contractors will sign anything as long as they get paid for it.

Senator SYMMS. And hope that they can get the job done?

Mr. FARRELL. That is correct. But the responsible contractors, no, sir, will not bid on this kind of work.

Senator SYMMS. But this isn't necessarily a problem like Mr. Neumeyer testified about asbestos?

Some of these jobs aren't real big jobs; you don't have to be a big company but you have to be highly sophisticated in terms of knowing what to do, I take it, and having the proper equipment and apparatus?

Mr. NEUMEYER. Yes.

Senator SYMMS. So, some of the jobs you are on are not necessarily big jobs or require a big company, then?

Mr. NEUMEYER. That is true. We are hoping the Government will step in and put together some type of qualification program or some type of licensing mechanism for asbestos abatement contractors. The program right now is in effect in Maryland, but that is the only State.

Senator SYMMS. Well, I have several other questions. I have been notified I have an amendment pending on the floor, so we are going to have to wrap this up in a hurry.

Mr. Poirot, is it P-O-I-R-O-T?

Mr. POIROT. Yes, Mr. Chairman.

Senator SYMMS. Why should the public accept the responsibility for the actions of private cleanup contractors?

Mr. POIROT. Why should the public? Is that your question?

Senator SYMMS. That is the question. In other words, the Government, the taxpayers.

Mr. POIROT. First off, the private contractors were not involved in creating this risk that exists today. We are involved in the process of cleaning it up.

I have an analogy that relates to why should a policeman of a municipal police force be required to share in the damage that is created by a fire if; in fact, he was involved in trying to find the arsonist that created the fire? It seems to be like the arsonist should be involved in the responsibilities, not the policeman.

In our case, we feel that we are a part of the team cleaning it up. Therefore, we should not be a part of the process of sharing the damages that created the problem to begin with.

Does that answer——

Senator SYMMS. That sounds like a pretty good answer to me.

Mr. POIROT. I have another response that I would just like to quickly make, and that relates to the open competition. We feel very strongly that to provide quality assurance in this program, in such a risky program, first we need to be involved in selecting the engineers that are analyzing and designing these facilities to be selected on the best qualifications basis, and that programs that set aside, as you infer, do exist. There is a set-aside program, that eliminates the large firms that have the most indepth experience and the most qualified. They would not be able to compete and therefore be involved in these programs.

Senator SYMMS. What is the definition of what is a small business in the Superfund cleanup? Is it 500 employees?

Mr. POIROT. No; the definition is related to total gross income. Right now, the limit I believe, is $7.5 million per year and that equals about 150 employees. So, all firms smaller than 150 employees would be allowed to compete. Those above would not.

Senator SYMMS. What you fear is that if we make it too stringent, some of the companies that are most able to do it may not be able to bid.

Mr. POIROT. Exactly. They would not be able to compete.

Senator SYMMS. I see. That is what I mean, not be able to compete, to actually be involved.

Mr. POIROT. To be considered, yes.

Senator SYMMS. OK. Well, I am going to submit, through the counsel here, several other questions to some of you. Due to the lateness of the hour, I want to thank all the witnesses this morning on behalf of the committee and on behalf of Chairman Stafford.

I have one last question we would like to get on the record here, and that is that a number have testified that they are unable to buy insurance and that the price is high if they can buy it. The purchase of liability insurance is only one way of providing evidence of financial responsibility. It is also only one way of protecting yourself.

Are any of your groups investigating alternatives to privately purchased liability insurance and, if so, are there any programs available that this committee should know about?

Mr. **Zimmer**. We are investigating that possibility through the Hazardous Waste Treatment Council. We have not come across any companies yet that have been able to provide us that insurance.

Senator **Symms**. Yes?

Mr. **Parker**. On behalf of NSWMA, we are presently in the process of doing a feasibility study to determine whether, in fact, we can establish an offshore captive insurance facility as the only option that we presently see right now. I stress it is still a feasibility study, but we are actively in the process of doing that now.

Senator **Symms**. OK. Well, thank you all very much. There will be some other questions from the committee.

The committee stands in recess.

[Whereupon, at 1:43 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

[Statements and other material submitted for the record follow:]

STATEMENT OF F. HENRY HABICHT II
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

APRIL 3, 1985

Mr. Chairman, members of the Committee, I am pleased to appear before you today. I would like to contribute to this discussion of environmental insurance issues by giving you the perspective of the Justice Department on relevant aspects of our enforcement program under Superfund and the Resource Conservation and Recovery Act.

As this Committee well knows, RCRA is primarily a regulatory statute, premised on the need for standards and requirements to control hazardous waste management and disposal practices. A vigorous enforcement program is necessary to provide a maximum deterrent to potential violators of the law.

Our view of enforcement under Superfund, which is largely a source of response authority rather than a regulatory statute, proceeds from two legislative premises: (1) that substantial cleanup of uncontrolled abandoned hazardous waste sites must be achieved expeditiously; and (2) that the persons with primary responsibility for contamination of specific sites should pay for the cleanup of those sites. These goals can often be achieved simultaneously, because private party cleanup actions can frequently be carried out more swiftly and efficiently than remedial actions the government must administer.

This Administration is committed to a strong enforcement program that will bring about the maximum practicable number of privately funded and performed cleanups. Otherwise, Superfund will be little more than a public works program funded by a massive tax that will necessarily impose costs on certain businesses very much out of proportion to their actual responsibility for contamination and cleanup costs at the priority hazardous waste sites. Moreover, unless private parties participate heavily in the Superfund program through voluntary negotiated cleanup actions, the backlog of sites and of cases will continue to grow rapidly.

Based on the foregoing principles, the Superfund enforcement program is designed to provide maximum incentives for financially solvent responsible parties to come forward and clean up the hazardous waste sites in which they have been involved. The thrust of the program is to lead private parties to negotiate and come to terms with EPA in the first instance, thus avoiding the need to rely on court action to compel private parties to clean up sites and to replenish the Fund for use at other cleanups.

Although the Superfund and RCRA programs have presented numerous enforcement challenges, we have been largely successful in meeting those challenges. For example, as a result of our litigation efforts, the courts have developed legal principles under CERCLA that clarify a responsible party's legal obligations and thereby encourage such parties to come forward and engage in cleanup activity. Based on extensive analyses of the statute, its legislative history, and other applicable legal rules, the courts have determined not only that strict liability applies under CERCLA, but that joint and several liability is generally appropriate under CERCLA where the harm is indivisible. Moreover, parties liable under CERCLA have been held to include past and present facility owners and operators, transporters, and off-site generators of hazardous substances.

Using the legal rules developed and applied by the courts under CERCLA and RCRA, the Justice Department has been successful in obtaining private party cleanups of hazardous waste sites. For example, we estimate that, through judgments and consent decrees in the cases we have filed under CERCLA and RCRA, the value of the private party cleanup activity achieved has exceeded a total of $230 million over the past three fiscal years. Our most recent statistics indicate that we obtained 21 hazardous waste settlements valued at nearly $120 million in 1984 alone. The incentives created by this litigation have led to additional valuable private party actions in response to EPA administrative orders.

Such negotiated settlements can in fact contribute significantly to public health and safety. In September 1983, for example, we signed a consent decree with 254 defendants who voluntarily organized and agreed to perform a surface cleanup of chemical wastes at the Enviro-Chem site in Indiana. The government's investigation indicated that these defendants were responsible for roughly 80 percent of the waste at the site. The cleanup involved removal of approximately 25,000 drums and 56 bulk storage tanks that were leaking or overflowing a short distance from a tributary that leads into the main drinking water supply for the Indianapolis area. An action to recover costs not covered by the settlement -- now about $1.8 million -- is proceeding against 33 nonsettling generators and the owners and operators.

Another significant settlement was achieved with the ten generator defendants that the government had sued to obtain cleanup of the two Petro Processors sites near Baton Rouge, Louisiana. The two sites involved a total of more than ten million cubic feet of waste in lagoons and filled areas. Not only had the previously abundant life in the areas surrounding the two sites been adversely affected by spills and overflow from the sites, but the aquifer beneath the sites had been heavily contaminated. On the eve of trial, the ten defendants, who were responsible for between 95 and 100 percent of the waste at the two sites, agreed to be jointly responsible for the surface and subsurface cleanup of the sites. The cleanups will involve substantial excavation and removal of waste and the placement of several wells for the testing and treatment of contaminated groundwater. The defendants also agreed to reimburse the government for the majority of the costs it had incurred.

These are examples of the thirty or so section 106 cases that we have filed during the last three fiscal years. Over the same period, we have also filed more than fifty cases under section 107 to recover response costs.

In light of our rapidly growing caseload, the Department and EPA have worked together to refine the case selection process and to develop guidelines for settling Superfund cases. Because an understanding of how we select and settle cases is important to an understanding of the enforcement program as a whole, I would like to describe in just a little more detail how these guidelines work.

The first step in the current enforcement process is for EPA to notify potentially responsible parties, collect information about the site, and select an appropriate remedy. Unless a private party agrees to conduct a remedial investigation and feasibility study in accordance with EPA rules, EPA will conduct the study. After a remedy has been selected, EPA will seek to obtain a cleanup or the costs of cleanup through negotiation and other administrative processes.

As set forth in the interim settlement policy developed jointly by EPA and the Justice Department, the ultimate objective of these negotiations is to obtain a complete cleanup or to collect 100 percent of cleanup costs from responsible parties. Nonetheless, responsible parties are given all reasonable opportunities at this stage to propose and negotiate over appropriate response actions. Collective action among such parties is encouraged by EPA through the release of information, such as the identity of notice letter recipients and the volume and nature of wastes identified as having been sent to the site by particular parties. Because time remains of the essence, parties are given a limited time period in which to reach agreement with EPA.

If responsible parties are unable to reach an agreement with EPA concerning the appropriate remedy for the site, the

Agency has several options. It may implement the remedy itself and seek to recover cleanup costs from responsible parties, issue an order to require the responsible parties to undertake the cleanup, or refer the case to the Justice Department to obtain court-ordered injunctive relief. In some cases, a combination of enforcement options may be employed.

Because enforcement resources are limited, EPA does not refer all potential enforcement cases to the Department. Generally speaking, we will initiate action to compel responsible party cleanups only when there is a substantial health or environmental threat and we have identified an adequate number of responsible parties who are financially capable of implementing the remedy.

The government tries, under CERCLA and the imminent hazard provision of RCRA, to bring a meritorious case against financially sound parties who are responsible for the environmental contamination at the site. Although it is frequently difficult or impossible to gather comprehensive information on each point about each potential defendant, the following considerations are important:

1. The quantity of material sent to the site by the responsible party;
2. The nature of the wastes sent to the site by the responsible party;
3. The strength of available evidence tracing the wastes at the site to the party;

4. The ability of the party to undertake or pay for the cleanup; and
5. The government's estimate of the number of defendants that can be included in the case fairly and efficiently.

The government does not initiate actions against parties that have not either contributed significant quantities of waste or contributed waste that is markedly hazardous. Great care is taken to ensure that a fair and appropriate number of responsible parties are named in any action that is filed. Defendants are not selected on the basis of any "deep pocket" theory; financial status is relevant only because the litigation would be pointless if the parties sued could not afford to undertake or pay for the cleanup.

As noted in the interim settlement policy developed by EPA and the Department, the factors that I have listed as relevant to the selection of defendants also enter into the government's consideration of settlement proposals made by responsible parties. The settlement policy has other important features. For example, it provides for partial settlements when the responsible party has offered to perform or pay for one phase of a site cleanup and it is important or useful to complete that phase before proceeding with the remainder of the response action. Partial settlements may also be allowed when they involve a substantial portion of the remedy or costs and the recalcitrance of a relatively small group of parties is preventing complete settlement.

In some circumstances, where there has been a partial settlement, the settlement policy authorizes the use of Fund money to augment private cleanup funds. In addition, to encourage settlement, EPA and the Department have developed a policy that allows a responsible party to "cash out" with the government in certain limited situations: for example, when the total cleanup costs were less than $200,000; when the responsible party is already in bankruptcy proceedings; or when the responsible party is deemed a "de minimis" contributor because the quantity of waste contributed to the site by that party is extremely small and of low toxicity. EPA is currently preparing additional guidance on aspects of this policy.

The government remains committed to obtaining complete cleanup or 100 percent of the costs of cleanup from responsible parties. Moreover, once a case has entered the litigation pipeline, sound enforcement policy dictates that the Department take a firm stand on this goal. Only in this way can we encourage responsible parties to reach negotiated solutions with EPA in the first instance. We are, of course, always willing to negotiate in our cases, if a dialogue with responsible parties will be meaningful. In fact, virtually all of our CERCLA enforcement actions eventually settle.

In sum, our goal is to assess the costs of cleanup in such a manner as to obtain 100 percent of our cleanup cost from as close to 100 percent of the responsible parties as is possible. In order to achieve this goal, we need a system of incentives that will enlist private parties in the enforcement process. We need a system that encourages private parties to apportion responsibility among themselves, and at the same time encourages the parties to organize and coalesce. We believe that a scheme which allows apportionment in lieu of joint and several liability may encourage parties to focus on limiting their personal liability rather than on joining together to achieve a cleanup. We believe joint and several liability provides incentives to parties to work together, allows responsible parties to bring others into the process through contribution, and ultimately assures that those with the largest share of responsibility will bear the lion's share of costs.

It is neither our intent nor our practice to place unnecessary burdens on persons who are attempting in good faith to comply with the letter and spirit of CERCLA and RCRA. Instead, through vigorous and well-designed enforcement programs, we are trying to ensure that persons who might otherwise evade responsibility for their actions are held accountable for their part in achieving the vital objectives established by these laws.

Thank you for your attention.

STATEMENT
OF THE
AMERICAN INSURANCE ASSOCIATION
PRESENTED TO THE
SENATE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS

APRIL 3, 1985

The American Insurance Association (AIA) is a trade association which represents 170 property and casualty insurance companies. The member companies of the Association have provided new insurance products designed to service the financial responsibility requirements in CERCLA and RCRA.

The insurance industry's ability to provide a market for current and future environmental liability insurance has been crippled by legislative and judicial decisions that dramatically affect the liability of insurance companies under already issued policies. The root cause of this is the confluence of two events: responsible parties found liable for clean-up costs under CERCLA's expansive liability scheme seeking to shift those costs to their insurers and recent court decisions greatly expanding the scope of coverage of the liability insurance policies under which the CERCLA responsible parties are attempting to recover.

Responsible Parties Found Liable for Clean-Up Costs Under CERCLA Are Seeking To Shift Those Costs to Their Insurers

An ever increasing number of persons who are being found liable under CERCLA for clean-up costs are submitting claims for payment of those clean-up costs to their insurers. This represents a monumental problem for insurers in that the industry's standard liability insurance policies were not intended to cover the liabilities created by CERCLA. In fact, many of the liability policies under which CERCLA responsible parties now seek recovery were written prior to the enactment of CERCLA.

For already issued policies, CERCLA upsets the risk predictions that were the keystones of designing and pricing the insurance coverage. For the future, CERCLA creates one of the fundamental impediments to the ability of insurers to provide insurance coverage for environmental risks.

CERCLA accomplishes this by:

> Retroactive Liability -- The Justice Department and EPA are interpreting CERCLA to impose liability for clean-up of those hazardous waste sites that were created prior to enactment of the law. Persons are being found liable under CERCLA's standards for conduct which, at the time it occurred, was permissible under federal law. As a result of the claims filed by these persons, insurers face the prospect of the imposition of massive retroactive liabilities.
>
> Nearly Absolute Liability -- Section 107 of CERCLA imposes liability for clean-up costs and damage to natural resources resulting from "releases" of hazardous substances that is absolute except when a potentially responsible party can establish that the release was caused solely by an act of God, and an act of war, or by a third party with whom he had no direct or indirect contractual relationship.

Under this standard, consideration of the potentially responsible party's conduct is not relevant to the imposition of liability. Defenses which are available under the doctrine of strict liability -- state of the art, assumption of risk, misuse and subsequent alteration or modification -- have no bearing. However, the liability insurance held by the potential CERCLA defendant was based on the insurer's evaluation of the risks represented by that policyholder's activities and conduct. With CERCLA's nearly absolute liability, the insurer's evaluation of the risk presented by his policyholder has been divorced from the liability that that policyholder may be required to assume.

Joint and Several Liability -- CERCLA has been interpreted to provide for the application of joint and several liability. Under joint and several liability, each defendant is liable for all damages rather that being liable only for that defendant's contribution to the cause of the damages. Joint and several liability creates the likelihood that a policyholder's liability will bear no relationship to the policyholder's conduct. The policyholder's premium was based on the insurer's perception of the activities engaged in by that policyholder. The insurance policy was not issued with the intent of covering conduct of persons not party to the contract. Due to the application of joint and several liability, the insurance company is faced with providing coverage for which it received no premium.

Liability Without Cause -- The Justice Department agreed,[1] that CERCLA requires no showing by the Government that a substance for which the defendant was responsible has been released or threatens to be released from the site at issue. This statutory abrogation of the "cause-in-fact" concept creates a legal environment in which the insurer's coverage of an "occurrence" is irrelevant: liability attaches not to the release of a particular substance, but rather to the mere presence of that substance at a site from which there has been a release of some other substance. Insurance policies were neither designed nor priced to provide coverage for the liability of a policyholder arising from, in essence, a non-event.

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[1] See U.S. v. South Carolina Recycling and Disposal, Inc., 10 Env't Rep. Cas. 1763 (S.D.C. 1984).

CERCLA's liability system not only adversely affects an insurance company's exposure under its insurance policies, but it also dramatically increases the insurance company's transaction costs related to the defense of claims presented to it.

Since its enactment, CERCLA has spawned a massive round of litigation in which the federal government has sought to compel responsible parties to pay for clean-up costs or to undertake clean-up activities themselves. Because of the enormity of the costs at stake and the perceived unfairness of the CERCLA liability scheme, potential responsible parties, more often than not, have contested vigorously enforcement actions that seek to impose clean-up liability.

Enforcement actions, in turn, produce litigation among potential responsible parties seeking to apportion liability and by these parties against their liability insurers. This litigation is and will continue to be complex, time-consuming and incredibly expensive. Parties suing their general liability insurance carrier seek, at minimum, coverage of their defense costs and indemnification of whatever clean-up liability is ultimately imposed upon them.

The American Insurance Association has commissioned the consulting firm of Putnam, Hayes and Bartlett, Inc. to investigate the magnitude of total CERCLA litigation costs. They have completed their report and their conclusions are startling:

-- Likely litigation costs range from $3.5 - $6.4 billion compared to $14.6 billion in direct costs of cleanup. The best estimate of the litigation costs is $5 billion.

-- Litigation costs are substantial. They represent 24 to 44 percent of direct cleanup costs.

-- Private party litigation costs account for 79 percent of this total costs, while government costs and coverage litigation costs account for 15 percent and 6 percent, respectively.

- By comparison to asbestos litigation costs, Superfund litigation costs are at least as large and possibly more than twice as large as asbestos litigation costs.
- If two-thirds to three-quarters of Superfund transaction costs could be eliminated, then, using the best estimate of litigation costs, 400 to 450 additional sites could be cleaned up at no additional cost to society.
- The report's Superfund litigation cost estimates are conservative, that is, actual costs may exceed these projections. The report assumed some reduction from current litigation cost levels in these projections. If costs continue at present levels, total litigation costs could exceed $8 billion, 55 percent of direct cleanup costs.

Recent Court Decisions Have Expanded Insurance Coverage Beyond That Which The Liability Policies Were Designed to Provide

The Insurance Coverage The Industry Intended to Provide

The comprehensive general liability ("CGL") insurance policy is the instrument used to provide the vast majority of insurance protection for commercial entities from liability for bodily injury and property damage. The standard CGL insurance policy is nothing more than a contract between the insurer and the insured in which, among others, the parties define both the risks covered by the insurance and those excluded from coverage. The premium charged by the insurance company relates directly to the frequency and severity of the risk that the company intends to insure.

Most relevant to claims for clean-up costs arising from CERCLA, the insurance industry intends its standard CGL policy to provide only for specifically defined events causing pollution which take place off the property of the insured and cause property damage or personal injury. The most crucial operative provisions in the standard CGL policy include:

- owned property exclusion: the CGL policy does not provide coverage against the costs of maintaining a policyholder's property. The industry rightfully believes that any coverage that creates a "moral hazard" -- an incentive to the policyholder to neglect a natural duty in order to benefit from his insurance -- should be avoided.

  For example, a homeowner's insurance policy will not cover the costs of interior damage resulting from the insured's failure to repair leaks in his roof, but it will cover the cost of replacing that same roof if it is blown off in a windstorm.

  In the hazardous waste context, the owned property exclusion in the CGL policy is intended to give the policyholder an incentive to comply with RCRA standards and properly maintain his property. The moral hazard that would attend the absence of such an exclusion of on-site coverage would be particularly acute in such an inherently dangerous activity.

  Thus, the standard CGL policy contains an owned property exclusion which generally states that coverage would not apply to: "property damage to: (1) property owned or occupied by or rented to the insured, (2) property used by the insured, or (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control."

- pollution exclusion: it was never the intention of the insurance industry to cover liability arising from all forms of pollution. Thus, every CGL policy contains provisions excluding certain forms of pollution from coverage. Companies have used different language to define the nature of the pollution that was not being covered in its policies. Most insurance companies chose to impose a temporal restriction and to permit coverage for only that pollution which was "sudden and accidental." With this exclusion, for example, the industry intended to cover the breach in the hazardous waste impoundment wall that caused wastes to run off onto neighboring property but not to cover the gradual leaking of wastes from that impoundment.

  A CGL policy containing the "sudden and accidental" exclusion provides: "This insurance does not apply ... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." (emphasis added)

- occurrence: coverage exists only if there is an occurrence which is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;"
- property damage and bodily injury: The CGL policy contains definitions of the terms "property damage" and "bodily injury." These definitions are used to help determine (1) the events that must occur in order for there to be insurance coverage and (2) the level of benefits to be provided. The latter is to guarantee that insurance benefits are to be paid only for actual, not speculative, property damage or bodily injury.

In addition to these provisions, other language in the standard CGL policy establishes specific dollar limits of insurance coverage for each event triggering liability. By this language, the insurer sought to minimize the unpredictability that any liability system contains by establishing a limit on the amount of money that that insurer could stand to lose as a result of a particular event.

Insurance Coverage As Found by Court Decision

Court cases interpreting these critical provisions of the industry's CGL policy have expanded considerably the level of insurance coverage that the industry intended to provide. These court interpretations would require the industry to fund enormous obligations which it never contracted to assume, and for which it never collected a nickel of insurance premium.

It must be emphasized that not all the cases interpreting the CGL policies are uniform; several cases, in fact, interpret the CGL policy language to reflect what the insurance industry understanding was the intent of both parties to the contract. Also, many of the decisions adverse to the industry have not yet reached the highest appellate courts and, thus, conceivably could still be reversed. Nevertheless, having considerable experience at spotting emerging judicial trends, the insurance industry believes that the decisions rendered to date compel it to conclude that courts are electing to interpret loosely the insurance policy contract language in order to maximize insurance coverage for damages related to hazardous wastes.

Specifically, we perceive a trend in court decisions that interpret our standard CGL policy to broaden the scope of intended coverage as follows:

- Narrowing the intent of the owned property exclusion to find liability for damage to an insured's property.[2]
- Overriding the scope of the pollution exclusion so that, for example, well contamination caused by seepage at a hazardous waste site that occured over a 12 year period was found to be covered despite the policy requirement that coverage be afforded for only "sudden and accidental" pollution.[3]
- Converting the CGL's policy dollar limit per occurrence into a per claim dollar limit.[4]
- Setting aside the definitions of property damage and bodily injury so as to award speculative damages for the possibility of future harm.[5]

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[2] See, for example, Riehl v. Travelers Insurance Co., ___ F. Supp. ___, Civil Action No. 83-0085 (W.D. Pa., August 13, 1984).

[3] See, for example, Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Company, 186 N.J. Super. 156, 451 A.2d 990 (1982). Waste Management of Carolinas, Inc. v. Peerless Insurance Company, 323 S.E. 2d 726 (Court of Appeals of North Carolina, December 28, 1984).

[4] See Township of Jackson v. American Home, et al., Docket No. L-29236-8 (Law Div., August 31, 1984).

[5] Ayers et. al. v. Township of Jackson, 189 N.J. super. 561 (Ocean County, April 5, 1983).

The Insurance Industry Can Not Now Cancel Its Existing CGL Policies to Minimize The Impact Of The Adverse Court Decisions and the Expansive and Retroactive CERCLA Liability

As noted above, the CGL policy provides insurance coverage for damages arising out of an "occurrence" during the period that the insurance policy was in place. Using an example, a municipality operating a waste site that purchased a CGL policy in 1980 can look to that policy for coverage for damages caused by all "occurrences" in 1980 even though the consequences of and claims related to an "occurrence" in 1980 may not arise until years later. No new premium need be paid to keep that insurance coverage for 1980 in place. Once the premium for the CGL policy is paid, the coverage becomes effective and cannot subsequently be cancelled.

Thus, the insurance industry cannot counteract the judicial and statutory expansion of its already issued CGL policies by either cancelling those policies or collecting new premiums. Absent other corrective action, the insurance industry's sole recourse to the judicial and statutory expansion of its policy coverage is to continue to contest, on a case by case basis, each claim which it believes seeks recovery for liabilites beyong the scope of the policy.

Statement of
William O. Bailey
President, AEtna Life & Casualty
on behalf of the American Insurance Association
before the
Committee on Environment and Public Works
United States Senate

Washington, D.C.
April 3, 1985

Mr. Chairman and Members of the Committee:

My name is William Bailey. I am President of AEtna Life & Casualty and the immediate past Chairman of the American Insurance Association. AIA's member companies collectively write the overwhelming majority of the commercial general liability insurance that is the focus of this hearing. We appreciate the Committee's courtesy in affording us this opportunity to present our concerns regarding the effects of the Superfund law and recent judicial interpretations as to insurance coverage on our industry and on insurance markets.

The insurance industry's ability to provide a market for current and future environmental liability insurance has been crippled by legislative and judicial decisions that dramatically affect the liability of insurance companies under already issued policies which, in many cases, expired many years ago. The root cause of this is the confluence of two events: responsible parties, found liable for cleanup costs under Superfund's expansive liability concepts, are seeking to shift those costs to their insurers; and this is happening at a time that recent court decisions have greatly expanded the scope of coverage of the liability insurance policies under which the Superfund responsible parties are attempting to recover. If I accomplish nothing else today, I hope I make clear my belief that hazardous waste cleanup is a national problem of great complexity that cannot be resolved through retroactive determinations of responsibility backed up by bad interpretations of insurance policies which place the ultimate burden on the insurance industry.

I'd like to focus today on three areas:

1) the unfairness and inefficiency of the current Superfund system, with its undisputed potential for arbitrary imposition of liability and massive transaction costs;
2) the effects of recent court decisions that these liabilities and transaction costs are covered by insurance policies, despite policy language specifically excluding such coverage; and
3) the question of whether the pollution exposures of cleanup contractors, generators, haulers, and site owners are insurable under the current system.

Beginning with the system itself, the Superfund Act has now been construed to provide joint, several, retroactive, and strict liability, without even a need to demonstrate a causal relationship between the acts of the defendant and the pollution in question. In addition to allowing recoveries for activities which were neither illegal, negligent, or even unreasonable at the time they took place, this construction permits - even encourages - selection of responsible parties based not on actual contribution to the pollution hazard, but rather on ability to pay. In fact, we have reached the point where we now have suits being brought under Superfund against innocent parties to recover cleanup costs resulting from illegal dumping by others. I refer you to a March 14 article in The New York Times describing a Superfund suit to recover the costs of cleaning up municipal landfills in New York City.

Although the major corporations which are defendants had paid to have the wastes delivered to certified sites, the hauler allegedly bribed a city employee to allow disposal at city landfills. The fact that the companies were unaware that their wastes were illegally redirected to city landfills is apparently considered irrelevant, with Mayor Koch quoted as saying: "Under Federal law it is academic whether the companies knew or did not know that the toxic wastes they generated were being dumped illegally."

It is any wonder that potentially responsible parties feel compelled to defend this type of litigation vigorously and to bring other parties into the suits to share the cleanup liabilities? Consequently, we are now seeing suits in which there are literally hundreds of defendants and in which the costs of litigation will almost certainly exceed the costs of cleanup.

In order to better understand this problem, AIA commissioned the consulting firm of Putnam, Hayes and Bartlett to investigate the magnitude of total Superfund litigation costs.* They have completed their report, which is described in detail in our written submission. Their conclusions are startling. Based upon the EPA estimate of an eventual National Priorities List of 1800 sites, the study concludes:

-- Likely litigation costs range from $3.5 - $6.4 billion, compared to $14.6 billion in direct costs of cleanup. The best estimate of the litigation costs is $5 billion (about one-third of direct cleanup costs).

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*See additional statement submitted by John Butler, Director Putnam, Hayes and Bartlett, Inc. for further discussion on Superfund litigation cost and delay.

-- Private party litigation costs account for 79 percent of the total costs, while government costs and coverage litigation costs account for 15 percent and 6 percent, respectively.

-- If two-thirds to three-quarters of Superfund transaction costs could be eliminated, then, using the best estimate of litigation costs, 400 to 450 additional sites could be cleaned up at no additional costs to society.

Frankly, it is difficult to understand why, in the presence of analyses like this, we tolerate such waste and such neglect of injured parties' and society's concerns in the guise of civil justice. I submit that it is time to change this system and get on with an expedited cleanup program.

The second area I want to discuss is the way some courts have interpreted - or distorted - policy language to find coverage for pollution losses where clearly none was intended. Until very recently, we believed that we did not provide such coverage, but recent court decisions are now causing us to question that belief.

As this is discussed at some length in the written statement we have submitted, I will mention only the most egregious of a number of assaults on our policy language.* In brief, insurance companies writing general liability policies for commercial risks have, since the early '70's, well before the enactment of Superfund, included a pollution exclusion in their policies.*

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*See supplemental statement submitted by the American Insurance Association for further discussion on court cases which misinterpret the intent of the CGL policy and the pollution exclusion.

*See supplemental statement submitted by Richard A. Schmalz for further discussion on the development of the CGL policy.

The standard industry exclusion provided that the policies did not apply to damages arising out of the release of "toxic chemicals,...waste materials or other irritants, contaminants or pollutants" unless the release was "sudden and accidental." Not only does this language expressly exclude gradual pollution, but the gap in coverage resulting from the exclusion was filled by the creation of a new policy form specifically covering gradual pollution (the Environmental Impairment Liability Policy). It is clear beyond reasonable doubt that the general liability policies with the standard pollution exclusion were not intended to, and did not, cover gradual leakage occurring over a period of time. Yet, many of the recent court decisions have, in fact, held that these policies did cover gradual pollution.

We believe, of course, that the decisions are wrong, and we will, therefore, continue to contest the issue on appeal and in new jurisdictions. Nevertheless, based on our experience with the judicial system, there is a significant chance that we will continue to lose more of these cases than we will win.

The effects of such judicial distortion of our policy language are substantial. The essential point here is that this kind of treatment in the courts is very different than the judicial restructuring of policy language we have become accustomed to in our industry generally. We can adapt, for example, to an occasional misinterpretation of the intent of our auto insurance policies. The individual loss costs are not likely to be truly significant, and we can generally either amend the language in question or adjust our rates so that the time period affected will be relatively short.

It's quite a different story, however, in the environmental liability area. Here, particularly because of the retroactive application of the Superfund law, the abrogation of our policy language exposes us to liabilities for continuing activities literally occurring over past decades. We cannot cancel these policies, for they have long ago expired, nor can we collect additional premiums now, nor can we amend or clarify our policy language retroactively. All we can do is continue to contest each claim we receive. And on that point I might add that, at AEtna, we are seeing more and more claims seeking coverage for gradual pollution related to site cleanups. We received very few such claims prior to 1984 and fewer that one a day by the latter part of 1984. We are now receiving these claims at the rate of almost two a day. And this, we believe, is just the tip of the iceberg, since cleanup activity has really just begun.

Our industry problem is further exacerbated, of course, by the fact that insureds stand virtually defenseless before the Superfund juggernaut, which imposes strict, retroactive, joint and several liability with substantial and, in many cases, unfair economic burdens. The Office of Technology Assessment estimates that the costs for cleanup alone may be as high as $100 billion. While none of the industry's surplus can appropriately be considered available to pay for cleanup, I would observe that this figure exceeds by a substantial amount the property-casualty industry's total capital and surplus. Because any reduction in surplus means less insurance written, continuation of this trend would result in a major reduction in the industry's ability to write all forms of property-casualty coverage, not just the environmental liability line. It is the industry's surplus which underlies its capacity to provide auto, homeowners, commercial and other insurance.

Let me now turn to the question of whether the environmental liability exposures of generators, haulers, site owner/operators, and cleanup contractors are insurable under the current Superfund system.* Until recently, it appeared that the answer was "yes" as far as conventional liability coverage is concerned. That is, though companies had pollution exclusions in their general liability policies, they also developed and offered the separate EIL coverage specifically tailored to the hazardous waste exposure.

More recently, however, we have realized:

1) That we cannot reasonably underwrite in this area because we cannot assess the likelihood that our insureds will become liable for cleanup costs, because such costs can be apportioned on an arbitrary basis pursuant to Superfund's expansive liability concepts which are novel at best;

2) that not even government can assess the overall liabilities in this area; I am told that EPA estimates cleanup costs of about $20 billion, OTA up to $100 billion, while the GAO is somewhere in between;

3) that we cannot rely on our policy language, as the courts increasingly show that they will bend it and stretch it to provide unintended coverage; and

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*See supplemental statement submitted by George K. Bernstein for further discussion of insurability.

4) that we cannot effectively spread our risk through reinsurance, because the reinsurance market has made it clear in no uncertain terms that it will not provide coverage in this area - until we face up to these problems.

Speaking for my own company, we simply cannot participate in this chaotic market; nor, it appears, can other insurance companies. The market for EIL policies is decreasing significantly, with only a handful of companies now providing a very limited coverage. And most - if not all - commercial writers are now considering the flat exclusion of pollution liability from their policies. Nevertheless, I know and you know that essential insurance must be provided somehow; for society both continues to generate waste and wants the problems of the past cleaned up. Waste generators and haulers need it, and contractors cannot undertake cleanup without it. Site owners, of course, are required by law to have it. The question is, what changes should be made to the current system so that environmental liability insurance can be obtained by those who need it?

The answer, I believe, requires us to address two separate problems. The first has to do with the fact that the current system potentially could impose such a substantial burden of the retroactive liabilities for cleanup on the insurance industry that we would have difficulty in servicing our normal markets, let alone the environmental liability market. A way to address this problem is contained in the AIA proposal, which I am told each of you and your staffs have received. While we do not put it forth as a perfect solution, or the only solution, it is structured to provide the relief we need with respect to retroactive liability, eliminate the excessive transaction costs associated with the current system and, most importantly, expedite site cleanup, which is of course the primary purpose of Superfund. The AIA proposal contains the elements of a positive solution, and we recommend your serious review and analysis of it.

The second problem is that no one can write insurance under a system which can arbitrarily assign massive liabilites to parties who may have no control over the loss producing events. No one will insure, at a price that would be considered reasonable, the best cleanup contractor in the country if that contractor may in the future be liable not for his own actions, and also for the failure of a site operator to properly contain the hazardous wastes. But that is the way the current Superfund law works.

We must address the current impracticality of providing insurance in a market in which even the most qualified parties can be subjected to massive liabilities for damages they did not cause and could not have prevented. We suggest a basic restructuring of the liability system imposed by Superfund. The liability which causes the major problem is the liability for leakage from a facility. Again, speaking for may own company, I would suggest that, with respect to a licensed dump facility, all liability for leakage be channelled to and limited to the owner/operator of the facility, the only party with any real ability to exercise loss control. Generators, which have properly identified wastes turned over to a hauler for delivery to a licensed facility, or haulers, which have properly identified wastes delivered to an approved site, would no longer be potentially liable for subsequent releases over which they have no control. Insurance coverage for any remaining liabilities of the hazardous waste generators and haulers should then be available in the private sector. The same would probably be true for qualified cleanup contractors with respect to their operations.

Even with such changes, however, the private sector would be unable by itself to provide coverage for site owners. This is because of the near certainty that leakage will occur and the open ended nature of the resulting liabilities. I don't have a ready solution to this problem, but I do know from personal involvement that the private sector and the federal government have worked together to address a number of hard-to-insure risks in the past, including nuclear liability, the Swine Flu innoculation program, flood insurance, crime insurance, and riot reinsurance. I would propose that we work with you, as we have in the past, to develop an appropriate insurance mechanism to address the identified environmental liability insurance problems. We wish to participate with you and your staffs in furthering the cause of cleaning up our environment in a rational, prompt and cost efficient way. We believe we have offered ideas that will move us in that direction.

Thank you for your interest and your consideration.

TESTIMONY OF

JOHN C. BUTLER, III
DIRECTOR
PUTNAM, HAYES & BARTLETT, INC.

ON BEHALF OF

AMERICAN INSURANCE ASSOCIATION
85 JOHN STREET
NEW YORK, NEW YORK 10038

BEFORE

UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT & PUBLIC WORKS

APRIL 3, 1985

COSTS OF SUPERFUND LITIGATION

I am John C. Butler, III and I am a Director of Putnam, Hayes & Bartlett, Inc. Putnam, Hayes & Bartlett is an economic and management consulting firm specializing in analysis of economic issues concerning the environment, energy, antitrust, and international trade among other issues. My professional experience has centered on public policy analysis of environmental issues. Prior to joining PHB, I have been employed by the World Health Organization, the United Nations Environment Programme, and the Environmental Protection Agency. During the past three years I have been engaged by numerous clients to conduct economic and financial analysis of Superfund problems, and in particular those problems associated with settling or litigating Superfund cases.

Superfund actions have generated a substantial amount of litigation. Litigation occurs between the government and potentially responsible parties (PRPs), among PRPs to apportion liability, and between those parties and their liability insurers. I have been asked by the American Insurance Association to investigate the magnitude of total Superfund litigation costs whether a case is settled or litigated -- by total litigation costs I mean all transaction costs involving potentially responsible parties (PRPs), government expenses, and insurance company expenses. Today, I will direct my comments to three areas:

- Observations on the Superfund litigation stalemate,
- Approach to estimate litigation costs,
- Projection of future litigation costs assuming 1800 sites are eventually named to the National Priorities List.

SUMMARY OF FINDINGS

Superfund cases are very complex and typically involve multi-party negotiation, and if this fails, litigation. Specific factual issues, such as the scope of the remedy and the cost of cleanup need to be resolved before cases are likely to be able to reach settlement. Uncertainty with respect to the factual matters and with respect to apportionment of liability among the PRPs discourages rapid settlement. Furthermore, uncertainty regarding insurance coverage of a PRP will be a major source of future litigation costs. Coverage litigation will address whether and how responsibility for payment is to be divided among PRPs and insurers.

Government action against some, but not all of the PRPs encourages the PRP being pursued by the government to initiate third party litigation. Government settlement policy, whose purpose is to ensure a strong negotiation position, actually, is designed to protect its litigation option rather than provide a framework for negotiation. The effect of this policy hinders early settlement and increases litigation costs.

To project future litigation costs I employed a variety of resources. Government costs were estimated through examination of EPA's budget materials and its CERCLA 301(a)(1) report to Congress on the Effectiveness of the Superfund Program. The actual costs to private parties were collected from examination of case studies, review of insurance company files, interviews with in-house counsel of generator firms, and interviews with outside counsel.

My cost projection assumes 1800 sites will be placed on the National Priorities List (NPL), at an average cleanup cost per site of $8.1 million for a total of $14.6 billion in total cleanup cost.* My findings are as follows:

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* These are the baseline assumptions used by the EPA in the CERCLA Section 301(a)(1)(C) study on future funding needs.

- If litigation costs continue at present levels, total litigation costs could exceed $8 billion, 55 percent of direct cleanup costs. In projecting litigation costs, I have assumed some reduction in current litigation cost levels will occur.

- Likely total litigation costs for 1800 NPL sites range from $3.5 - $6.4 billion compared to $14.6 billion in direct costs of cleanup. The best estimate of the litigation costs is $5 billion.

- Litigation costs are substantial. They represent 24 to 44 percent of direct cleanup costs. If the Office of Technology Assessment's estimate of $100 billion in direct cleanup cost is correct, then total litigation costs will be much higher than reported here.

- Private party litigation costs account for 79 percent of total litigation costs, while government costs and coverage litigation costs account for 15 percent and 6 percent, respectively.

- If two-thirds to three-quarters of Superfund litigation costs could be eliminated, then, using the best estimate of litigation costs, 400 to 450 additional sites could be cleaned up at the same costs to society as cleaning up 1800 sites under the current program.

A. OBSERVATIONS ON THE SUPERFUND LITIGATION STALEMATE

Background

Superfund gives the Government great authority and numerous methods for cleaning up hazardous waste sites. For example it provides for:

- Government cleanup of sites using the Fund

- Negotiated cleanup by private parties

- Reimbursement of governments' and private parties' cleanup expenses

- Administrative and judicial orders for cleanup

There is no doubt that ample authority exists in CERCLA to order cleanup or sponsor cleanup using the Fund. The government has recognized that the Fund is not large enough to sponsor cleanup at every site. As a consequence enforcement actions, forcing responsible parties to undertake cleanup, were needed to supplement the Fund. The government's string of judicial successes has proven it has a vast arsenal of litigation tools which can be used to easily establish liability against PRPs. However, cleanup progress has been quite slow, while major policy and legal debates are taking place at the EPA and in the courts.

Why The Stalemate in Superfund?

Given the seemingly airtight liability cases against most responsible parties, why the stalemate in Superfund? Why are negotiated cleanups so difficult to obtain? What are the incentives for rapid agreement with potentially responsible parties?

Several factors combine to inhibit early settlement of these cases and contribute to private party litigation costs. The factors can be grouped in four categories.

I. Complex Litigation and Extensive Data Gathering

Certain characteristics which occur in numerous cases contribute by their nature to increase litigation costs and discourage early settlement of cases. These characteristics are:

- Superfund cases often involve substantial numbers of PRPs and their insurance firms, many of which have conflicting interests.
- Liability costs may be quite high, therefore, PRPs and insurers spend large amounts to try to limit their liability.
- Duplicative engineering and technical studies are often undertaken to ascertain the strengths and weaknesses in an adversary's recommended remedial solution.
- Cases typically involve evaluation of massive amounts of technical data requiring use of expert personnel.
- Data on each party's waste contribution at the site are often difficult to obtain and subject to considerable controversy.

II. Factual Uncertainty of Technical Data

Specific factual issues need to be resolved before cases are "ripe" for settlement

- Uncertainty in choice of appropriate remedy and cleanup costs preclude early settlement.
- Uncertainty in apportionment of liability encourages litigation among PRPs.

III. Government Action and Policy

- Government action against some, but not all the PRPs increases the likelihood of third party litigation.

- Government policy prevents settlement by PRPs unless they are willing to contribute a "substantial portion" of the remedial costs, thus small parties who are willing to contribute their proportionate share are unable to settle.*

- Government's refusal to grant releases limiting liability for additional payment in the future discourages settlement since parties are not usually willing to accept open-ended liability.

IV. Secondary Litigation

- Uncertainty with regard to insurance coverage encourages litigation between a PRP and its insurance companies.

- Personal injury and property damage cases may be brought under State law once PRPs' liability for cleanup is established.

Each of the above issues is discussed below.

Complex Litigation

Some of the above factors are known to the government and may be strategically used to pit responsible parties against each other. For example, suing only a few PRPs will almost certainly result in the need to join other parties with claims being asserted by all parties against each other. This has happened for example, in the Conservation Chemical Company case. This case initially involved four parties. The original defendants cross claimed against more than 250 parties and insurance firms, thus causing litigation costs that may exceed the cleanup cost by a factor of two. One defendant projected pre-litigation costs to be \$5 - \$12 million, with litigation costs for the Phase I portion of the trial -- Phase I addresses the amount of damages sought by the government -- to be \$7 to \$16 million. Total private party litigation cost for the trial could be more than \$30 million. The government's litigation cost to date has exceeded \$2 million. No estimates are available for trial costs. These amounts greatly exceed the cost of cleanup which may range from \$10 - \$18 million. While filing a case against a few PRPs might be good government strategy for "winning" the case, since it divides the PRPs, it may conflict with society's objective to remove the site hazard at the least total cost.

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* EPA's recently published Interim CERCLA Settlement Policy (FR/2-5-1985, p. 5034) allows settlement with de minimis contributors of waste, however, such settlements are not afforded the same releases or contribution protections as substantial contributors. Hence, smaller parties are not given the same incentives to settle as larger parties.

Even if only a few PRPs are identified at a site, transaction costs can be high because a substantial number of insurance firms may be involved in coverage issues. At the Love Canal site, Hooker Chemical, the only defendant, had insurance policies with 37 firms during the period in which damages occurred. Similarly, at the Ottati and Goss site, one defendant is involved in a coverage dispute with 40 insurers.

At the Rocky Mountain Arsenal site only two parties are involved, Shell Oil and the U. S. Army. However, Shell claims insurance coverage from more than 245 firms during the period in which damages allegedly occurred. Determining whether coverage is available and apportioning the liability among the 245 insurance firms will involve significant transaction cost particularly since projected cleanup costs range from \$300 million to \$2 billion.

While the Conservation Chemical Company case is a prominent example of excessive litigation costs, few cases to date have settled all issues with minimal costs. The Envirochem site in Indiana is often identified (incorrectly) as a site where few transaction costs were incurred. The negotiations in this case were handled primarily by in-house counsel and involved 269 PRPs. In-house costs and consulting fees are estimated to be approximately $900,000 or 30 percent of cleanup costs. This figure does not include the government settlement costs incurred at the site. In addition, 150 settling parties are jointly filing a contribution claim against the site owner, operator, and its insurance carrier, which will further add to litigation expenses. Hence, even the Envirochem site which has been touted as an efficient settlement has incurred substantial litigation costs.

Factual Uncertainty

Sites are not ready or ripe for a negotiated agreement with the PRPs until certain facts have been established. These facts are:

- The scope and cost of the remedy
- The apportionment of liability among PRPs
- The proportion of liability and defense costs paid by insurers

PRPs are naturally quite interested in knowing the cost of cleanup prior to settlement with the government. Often the scope and cost of the PRP recommended remedy are quite different from the government remedy. Few incentives exist for rapid settlement without knowing the total cost of cleanup, how the cost will be shared by each PRP, and how the costs will be divided among the PRPs and their insurance carriers. Until these uncertainties are clarified many cases will not be settled. Courts have recently recognized that these uncertainties reduce the likelihood of settlement. In response, some courts have reversed the traditional sequence of events at trial by hearing the remedy issues first, followed by the liability issues. This sequence might encourage settlement prior to the start of the second phase of trial on the liability issues. However, for settlement to occur the parties must agree on how liability is to be apportioned.

Government Policy

The Government's settlement policy also inhibits early settlements and prolongs cases thus increasing costs to society.[*] First, unless PRPs are willing to contribute a "substantial portion" of the cleanup costs or undertake a "substantial portion" of the cleanup remedy, the government will not participate in a settlement agreement. Small parties who have been willing to contribute their proportionate share toward cleanup have been unable to reach a settlement agreement with the government. Hence, their involvement in tracking the negotiations continues and their legal fees mount. For example, two parties who were not defendants in the original suit brought by the government, but, were third party defendants tried to settle with the government for their proportionate share. When the government refused to settle, these parties had no alternative but to continue to track the settlement negotiation with the other PRPs. The case settled on the eve of trial and these two parties incurred legal costs more than three times the amount they paid in settlement.

Another problem with the government settlement policy is its refusal to grant releases -- such releases would limit a PRP's liability for cost overruns and/or future expenses to correct any post-cleanup problem. This delays settlement until many of the uncertainties with respect to scope of remedy and final costs of cleanup are resolved. Even if the cleanup remedy is selected, total cleanup costs are not known until cleanup is complete because of uncertainties about the cleanup technology, the waste volume, and so forth. Responsible parties are fearful that final cleanup costs will exceed the initial estimates given in the remedial investigation/feasibility study. Without adequate incentives for managing cleanup contractors, cost overruns which increase PRPs' liability may be substantial.

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[*] The report to the Administrative Conference of the United States on Negotiation and Informal Agency Action: The Case Of Superfund, describes the EPA settlement policy as "lawyers work" which is designed to protect the Agency's litigation option rather than provide guidance for negotiation.

Secondary Litigation

The underlying Superfund liability case often generates subsequent litigation against other parties. Secondary litigation spawned by Superfund actions is just beginning. As more Superfund cases are resolved, this type of litigation will occur more frequently. Two types of secondary litigation are of importance: contribution claims against non-joined parties and insurance coverage. As previously mentioned contribution claims against non-joined parties at Superfund sites are often brought into the suit as third party defendants. Insurers believe that many of their policies specifically exclude liability for waste site cleanup. Insurance coverage litigation addresses whether and how the responsibility for payment is to be divided among PRPs and insurers.

During the period in which dumping at a site occurred, each PRP typically has had several different insurers. As disputes concerning coverage of asbestos liabilities have shown, coverage litigation is exceedingly complex. Litigation costs of asbestos coverage issues were averaging about $900,000 per case in 1982. Recent press accounts of the massive asbestos coverage case in California project costs to be $200,000 per day. The case may last as long as a year which would imply legal costs as high as $40 - $50 million.

It is not easy to judge whether insurance coverage for site cleanup is available. Insurers contend the policies were not written to provide this type of coverage. Responsible parties, however, believe this liability should be covered by the policies. Whether coverage is to be provided will ultimately be determined by the courts. In simplified terms the central coverage issues are:

- What is the applicability of policy exclusions such as the pollution exclusion, which might exclude all damages except those which are sudden and accidental?
- What constitutes property damage? Is removal or abatement at a waste site property damage?
- What constitutes an "occurrence" within the terms of the policy, that is, what triggers policy coverage? Possible interpretations include date of initial waste deposition at the site, or date of initial pollutant release.
- What are the coverage limits? Some policies prior to 1970 often had a per occurrence limit with no aggregate limit. What is the number of occurrences at a site and the insurer liability?
- How is liability among a PRP's insurance carriers to be apportioned? What is the date of loss which would trigger coverage by a specific insurer?

A related question concerns the insurers' duty to defend the PRP regardless of whether or not the coverage would apply if the insured were found to be liable. Many insurers are paying defense expenses even though payment for liability has not been resolved. On many policies the duty to defend is not limited. Therefore, PRPs have few incentives to limit litigation costs since these costs will be passed on to the insurers.

Summary of Superfund Litigation Problem

- Superfund cases are very complex and often involve multi-party negotiation or litigation.

- A substantial factual basis often needs to be developed before parties can agree on the scope and cost of the cleanup remedy, and on how to share liability.

- Government actions and policies do not encourage settlement at multi-party sites. The current policies are administratively convenient for the government but cause private parties to incur substantial transaction costs.

- The uncertainty of insurance coverage and the fact that each PRP typically has policies with several carriers virtually guarantees that complex negotiation or litigation will be necessary to determine whether and how responsibility for payment among PRPs and insurers is to be divided.

B. APPROACH FOR ESTIMATING SUPERFUND LITIGATION COSTS

The method used to estimate Superfund litigation costs employs four major steps. First, the range of costs for the government and PRPs to settle or litigate Superfund cases is identified through case study analysis. Second, a conceptual framework to identify the extensive range of possible outcomes associated with the combination of settlement, litigation, administrative orders, contribution suits, coverage litigation, and so forth is developed. Third, the costs and frequency of occurrence of each possible outcome is assigned on the basis of historical observations and expert judgment. Fourth, the frequency of each outcome is multiplied by its respective cost and summed over all outcomes to give a total average cost per site. This result is multiplied by EPA's baseline estimate of 1800 NPL sites to determine the likely range of future transaction costs and the distribution of these costs between the government and PRPs. In addition, the cost of Superfund insurance coverage litigation was projected using historical data from other toxic tort litigation cases.

The cost estimates included in the analysis of transaction costs fall into the following four categories:

- Legal costs, both in-house counsel and outside counsel;
- Expert fees, including consultants and in-house technical experts;
- Insurance coverage litigation costs; and
- Duplicative engineering studies.

These categories of costs were examined to estimate the transaction costs borne by the government and PRPs in each of eight possible circumstances (i.e. outcomes). Each of these outcomes may exist alone or a number of them may be combined, depending on the decisions of the government and private parties. A decision tree analysis was employed to keep track of the frequency of occurrence of each outcome. The eight outcomes are:

1) Litigation of §107 suits;
2) Litigation of §106 suits;
3) Settlement of §107 suits;
4) Settlement of §106 suits;
5) Issue and response to Administrative Orders;
6) Judicial enforcement of Administrative Orders;
7) Litigation of contribution suits; and
8) Settlement of contribution suits.

To estimate the costs of these outcomes, I employed a variety of resources. Government costs were identified through examination of EPA's 1985 fiscal year budget (which included actual data for 1983 and 1984) and EPA's December 1984 report to Congress on the Effectiveness of the Superfund Program (i.e. CERCLA section 301(a)(1) report). The actual costs to private parties were collected from examination of case studies, review of insurance company files, interviews with in-house counsel of generator firms, and interviews with outside counsel who have often served as Steering Committee Chairpersons at multi-party sites.

Available government budget estimates do not separate the resources devoted specifically to settlement or litigation of Superfund cases. However, the total dollars spent in the enforcement of Superfund and by the Department of Justice (DOJ) in support of Superfund cases is available. In addition, the number of 106 suits, 107 suits and unilateral Administrative Orders are available from EPA's 301(a)(1) report. These data when combined provide an estimate of EPA's average cost of litigating or settling cases. Historically this average cost estimate ranged between $250,000 and $325,000 per case. The cost of judicial enforcement of Administrative Orders is estimated to be at the low end of this range or $250,000 per case.* The cost to the government of issuing an Administrative Order is assumed to be $25,000 per case, in addition to the costs given above.

Exhibit 1 summarizes the litigation cost assumptions used in this analysis for private party and government expenses. The private party costs include in-house counsel and technical staff costs, outside counsel, and consultant fees. These cost estimates are based on analysis of the information provided by the sources previously described. Cost estimates for sites involving varying numbers of PRPs have been normalized for

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* To the best of my knowledge no such action has occurred to date.

EXHIBIT 1

SUPERFUND LITIGATION COST ASSUMPTIONS

Transaction	Costs Per Case (Thousands of Dollars) Government	Private Parties
Litigation	$250 - $325	$2,000 - $4,000
Settlement	$250 - $325	$ 750 - $1,600
Judicial Enforcement of Administrative Order	$250	$ 500 - $1,000
Administrative Order	$25	$ 75 - $ 125
Litigate Contribution Suit	$0	$ 375 - $1,000
Settle Contribution Suit	$0	$ 125 - $ 250
RI/FS Oversight	$50	$ 50 - $ 200

this analysis assuming an average of 25 PRPs per site.* Furthermore, the private party cost assumptions shown in Exhibit 1 are 20 to 60 percent lower than typical current levels since it is believed that improvements in Superfund dispute resolution will occur in the future.

For both the government and private parties it was not possible to develop separate cost estimates for 106 and 107 actions. For purposes of this analysis we assume that the costs associated with 106 suits are the same as the 107 suits.

The cost of coverage litigation was estimated to range from $250 to $400 million in total. Insurance carriers claim handling costs of $25 million are included in this figure. This estimate assumes a $500 cost is incurred to process a PRP's claims at a site with all its insurers.** The coverage litigation cost was derived assuming an average cost per case of $1.5 million and that a cost equivalent to the cost of litigating three to five cases per state would be incurred. The cost per case figure is consistent with insurance company records on similar cases. However, it is substantially less than the projected costs of the combined asbestos coverage case underway in California.

The framework for identifying the major potential outcomes associated with Superfund cases is outlined in Exhibit 2. The exhibit illustrates the four major components of Superfund cases. The first component is the status of the site when the PRPs are initially notified of the potential liability. This is separated into two possible situations, either a future remedial action is planned at that site, or some past action has been

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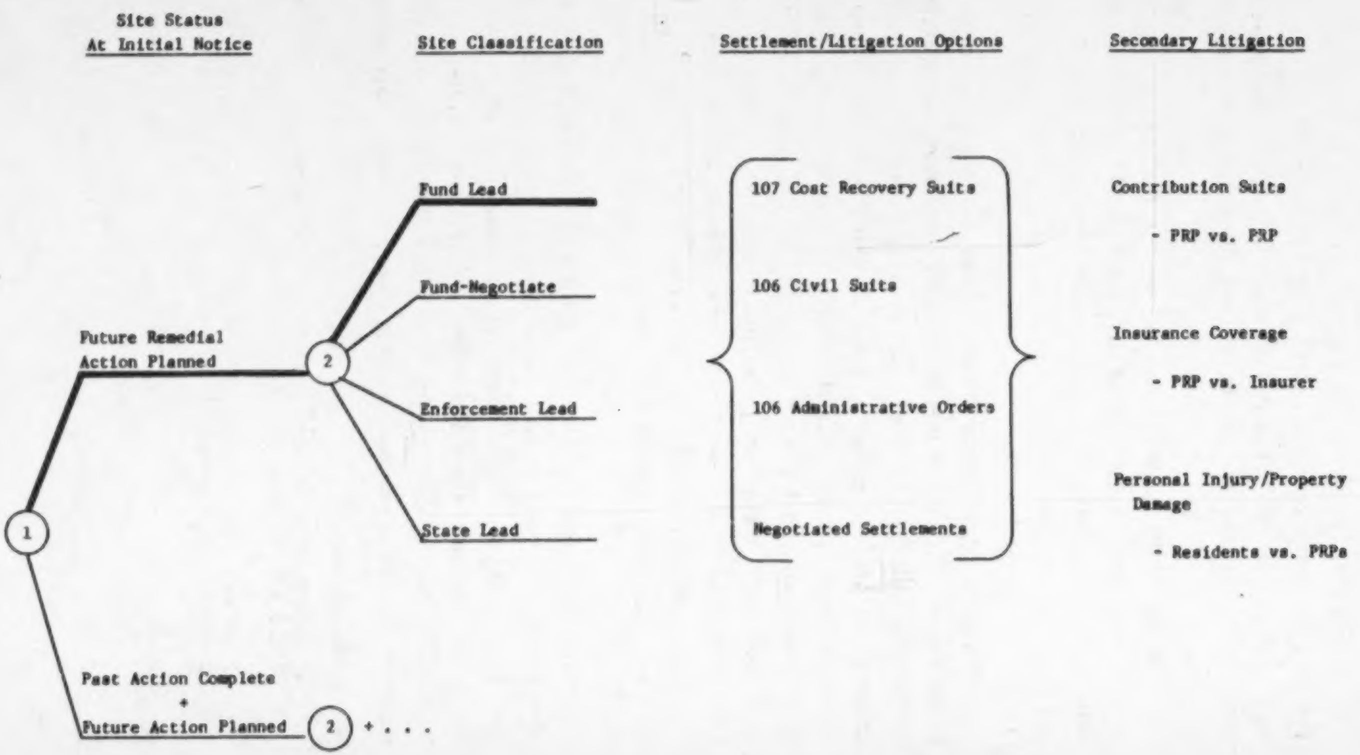
* This estimate is derived from the information in the CERCLA 301(a)(1)(A) report p. 4-7.

** 25 PRPs/site * 1800 sites * $500/PRP = $22.5 million which is rounded to $25 million.

Exhibit 2
SIMPLIFIED DIAGRAM OF
SUPERFUND SETTLEMENT/LITIGATION OUTCOMES


Site Status
At Initial Notice
Site Classification
Settlement/Litigation Options
Secondary Litigation
1
Future Remedial
Action Planned
2
Fund Lead
Fund-Negotiate
Enforcement Lead
State Lead
107 Cost Recovery Suits
106 Civil Suits
106 Administrative Orders
Negotiated Settlements
Contribution Suits
- PRP vs. PRP
Insurance Coverage
- PRP vs. Insurer
Personal Injury/Property
Damage
- Residents vs. PRPs
Past Action Complete
+
Future Action Planned
2
+ . . .

taken and additional future action is planned. The second component is the Site Classification. A site is classified by EPA into one of four possible categories:

- Fund Lead means Fund money will be used to cleanup the site;
- Fund Negotiate means negotiations with PRPs will be attempted, however if they fail, Fund money will be used to cleanup the site;
- Enforcement Lead means no Fund money is available and if negotiations with PRPs fail, enforcement action will be taken by EPA to ensure cleanup; and
- State Lead is similar to Enforcement Lead except the state and not EPA, will lead negotiations and bring enforcement action if negotiations fail.

The third component describes the Settlement/Litigation Options available to the government. The fourth component is Secondary Litigation and consists of contribution suits, insurance coverage litigation, and personal injury or property damage suits brought by local residents against PRPs. Information on the costs of these latter type of law suits is not available and is not included in this analysis.

Exhibit 2 describes schematically the possible settlement or litigation outcomes. The frequency of each outcome is assigned on the basis of historical observation and/or expert judgment. For example, at Node 2 of Exhibit 2 the frequency of the four site classifications is based on EPA's designation of 546 NPL sites. Fund Lead sites account for 33 percent of the total, Fund Negotiate sites account for 12 percent, Enforcement Lead for 31 percent, and State Lead for 24 percent. In this study, 432 possible outcomes of Superfund cases are examined. Given the probability assignments used in this study, 43 percent of all cases result in settlement with no litigation. The remaining cases involve some type of litigation which in some instances may result in settlement prior to trial.

To determine the total expected cost per site, the frequency of each of the 432 outcomes is multiplied by the costs associated with each respective outcome. The sum of these 432 products is the expected cost per site. To estimate the total future transaction costs, the expected cost per site is multiplied by EPA's baseline estimate of 1800 NPL sites.

C. PROJECTION OF SUPERFUND LITIGATION COSTS

The analysis begins by assuming 1800 sites will be named to the National Priorities List. The average cleanup cost per site is $8.1 million for a total of $14.6 billion in total cleanup cost.[*] The litigation costs shown below include projections of private party litigation costs, government legal and enforcement costs and insurance company costs. The findings are as follows:

- If litigation costs continue at present levels, total litigation costs could exceed $8 billion, 55 percent of direct cleanup costs. Some reduction from current litigation cost levels is assumed in the following projections.

- Likely total litigation costs for 1800 NPL sites range from $3.5 - $6.4 billion compared to $14.6 billion in direct costs of cleanup. The best estimate of the litigation costs is $5 billion.

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[*] These are the baseline assumptions used by the EPA in the CERCLA Section 301(a)(1)(C) study on future funding needs.

- Litigation costs are substantial. They represent 24 to 44 percent of direct cleanup costs. If the Office of Technology Assessment's estimate of $100 billion in direct cleanup cost is correct, then litigation costs could be much higher than reported here.

- Private party litigation costs account for 79 percent of litigation costs, while government costs and insurance coverage litigation costs account for 15 percent and 6 percent respectively (See Exhibit 4).

- By comparison, Superfund litigation costs are at least as large and possibly more than twice as large as asbestos litigation costs of $2.9 billion.*

The litigation cost projections above do not include any estimate of the cost of possible personal injury or property damage actions which could be brought under State law. Few data are available at this time to project the magnitude of these costs. Even without the personal injury or property damage suits, the magnitude of Superfund litigation costs are staggering. As a society, we should seek to clean up hazardous waste sites more efficiently without incurring excessive transaction costs. In addition to these litigation costs, substantial government personnel resources are involved in Superfund litigation. If the personnel resources could be redirected, then more staff would be available to manage technical cleanup and to enforce other statutes such as RCRA.

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* In the bankruptcy filing of Johns-Manville, Inc. a total of 48,500 asbestos lawsuits are projected. Using a RAND study estimate of asbestos litigation costs of $60,000 per case, total asbestos litigation costs would be $2.9 billion.

Exhibit 4

EXPECTED VALUE OF
SUPERFUND LITIGATION COSTS
(BEST ESTIMATE - 1985 $)

	Cost *	Percent
Private party litigation cost	$3.9 billion	79%
Government litigation cost	$0.7 billion	15%
Coverage litigation cost	$0.3 billion	6%
Total	$5.0 billion	100%

Column does not add to total due to rounding.

The excessive transaction costs associated with asbestos litigation have prompted the insurance industry, asbestos manufacturers, and asbestos victims to resolve this problem outside the court system. An asbestos claims facility is being established to more quickly compensate asbestos victims and to reduce litigation costs. By comparison Superfund litigation costs are at least as large as asbestos litigation costs. However, the approach used to reduce asbestos litigation costs, which was developed without the assistance of government intervention, may not be practical to resolve the Superfund problem. Thousands of companies are involved, or will be involved, in Superfund actions. Coordination of all these diverse parties in an attempt to more efficiently resolve Superfund issues would be very difficult. Furthermore, resolution of many Superfund issues are case-specific. However, if the Congress or private parties could design an approach to reduce two-thirds to three-quarters of Superfund litigation costs, then, using the best estimate of Superfund litigation costs, 400 to 450 additional sites could be cleaned up at the same costs as estimated for the 1800 sites under the current program.

Statement of George K. Bernstein
On Behalf Of The
American Insurance Association
Before The
Committee On Environment And Public Works
United States Senate
April 3, 1985

I am testifying today on the basis of 28 years of involvement with the insurance industry. I have dealt with the industry as Federal Insurance Administrator, overseeing government insurance programs developed because of the inability of private insurers to provide coverage for certain lines; as Deputy Superintendent and General Counsel and First Deputy Superintendent of the New York State Insurance Department; as a New York State Assistant Attorney General representing the Insurance Department; as counsel for an insurance ratemaking bureau; and for the last 10 years as an attorney and consultant for insurers, producers and insurance rating organizations and trade associations. I currently represent a state insurance department as court appointed agent for the receiver of an insolvent insurer with severe reserve deficiencies, whose book of business included environmental risks.

I deal with such areas as premium rates, underwriting, policy forms, investments, claims and reserving practices and insurer solvency. I have been called on to interpret policy language in the area of toxic torts and pollution in pending litigation and have advised on whether insurers should continue to write such coverage.

On the basis of this experience, it is my opinion that such insurance coverage as still exists with respect to pollution related risks is disappearing. In the absence of significant reform of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and a change in judicial directions, insurance coverage under that act will be unavailable.

Insurers are in business to write insurance and given an equitable statutory and judicial framework, will compete vigorously for business. Insurers obtain the income necessary to pay claims from premiums, which are set at a level expected to cover future losses and expenses and a reasonable profit. Future losses are calculated primarily through the evaluation of past experience and prospective developments.

If insurers are unable to project expected losses on a particular line of risks with any degree of confidence, premiums can not be set high enough to protect against potential financial catastrophe. In such circumstances those risks become uninsurable and responsible insurers will not cover them. Insurers will direct their capacity where there is a likelihood of profit, not where losses, in massive amounts are guaranteed.

This is the point that we have reached today with respect to pollution insurance under CERCLA. Insurers will not write insurance on generators, transporters, removers of hazardous substances or on any others who are covered by CERCLA, as long as that law creates massive, immeasurable liabilities for which no proper premium can be calculated or collected.

Congress can enact the most comprehensive laws aimed at achieving the essential goal of environmental improvement and safety. If, however, the terms of those laws and the existing legal framework deprive insurers of the ability to evaluate and price the exposure, the Congressional goal will have to be achieved without insurance.

The courts, in seeking a "deep pocket", may be able, by standing the English language on its head, to rewrite past and existing policies to impose liability on insurers where none was contracted for and where no premium for the judicially created coverage was collected.

But insurers would be derelict in their duty to policyholders and stockholders if they continued to issue policies that could be exposed to such judicial interpretations, especially when the liabilities are as massive as those imposed under CERCLA and when CERCLA is interpreted and enforced in a manner that also seeks the "deep pocket".

I. The current provisions of CERCLA are uninsurable:

-- Underwriters will not insure risks of this magnitude under a statute that imposes nearly absolute liability, and where the conduct of the insured party is deemed irrelevant to a finding of fault. But that is what §107 of CERCLA provides, and that is uninsurable.

-- Underwriters will not insure risks under a statute that imposes liability even in the absence of causation of damage. But that is how the Justice Department, with the support of at least one court, applies CERCLA, and that is uninsurable.

-- Underwriters will not insure risks under a statute that imposes joint liability by precluding the proper allocation of fault. But that is how the Justice Department, with the support of at least one court, applies CERCLA, and that is uninsurable.

-- Underwriters will not insure risks where not only is the standard of conduct retroactively changed but where the question of insurance coverage is based upon undetermined standards that did not apply at the time of the insured acts. But that is how EPA and the Justice Department apply CERCLA, and that is uninsurable.

-- Underwriters will not insure risks when insurers are prohibited from enforcing either the limits of liability or the specific defenses that are a part of the insurance contract. But that is what Subsections 108(c) and (d) of CERCLA may authorize, and that is uninsurable.*

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* Although the AIA appreciates the Committee's efforts in addressing this problem in §128 of S. 51, as reported, it is the only one of the CERCLA problems cited herein that would be remedied by S. 51.

II. S. 51, the Superfund Improvement Act of 1985, as reported, will not make CERCLA risks insurable*:

-- Nothing in S. 51 overturns EPA's and the Justice Department's application of CERCLA to create liability for conduct that was lawful at the time it occurred and when insurance was written. Accordingly, insurers continue to face significant reductions in surplus that could affect their solvency and certainly will reduce the amount of insurance they can write in all lines of property/casualty insurance.

-- Section 126 of S. 51 which precludes impleading and only permits contribution and indemnity claims after the initial action has ended, makes even more irrelevant the fault of an insured and worsens the uninsurability of risks subject to CERCLA.

-- Section 133 of S. 51 prohibits insureds from challenging the EPA response actions or clean-up orders until after EPA has taken the action and expended the monies for which the insured and thus the insurer could be liable, and that worsens the uninsurability of risks subject to CERCLA.

III. Recent court decisions creating insurance coverage that was specifically excluded when the policy was written have compounded the uninsurability of CERCLA risks:

-- When the courts ignore the plain language of an insurance policy and treat gradual contamination as "sudden and accidental", an underwriter will not write insurance when the premium was calculated as if only "sudden and accidental" pollution would be covered.

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* My comments here are limited to aspects of CERCLA that render its risks totally uninsurable. I do not deal with added defects of S. 51 that include the creation of "Citizens Suits" with their uncalculated costs or the failure of the bill to address the extraordinary transaction costs of CERCLA litigation, which far exceed the unacceptable costs of asbestos litigation.

-- When the courts ignore the "owned property" exclusion in a policy (included in an effort to prevent the creation of "moral hazards"), an underwriter will not write insurance when the premium is calculated on the basis of that exclusion and when such insurance is against public policy.

-- When the courts ignore the policy limits for each "occurrence" and apply that total limit to each claim that arises under an occurrence, an underwriter will not write insurance that has no limits of liability.

-- When the courts ignore the definitions of "property damage" and "bodily injury" and create liability for speculative damages and the possibility of future harm, an underwriter will not write insurance against a theoretical event that can not be quantified or even identified and for which no premium can be calculated.

* * * * * *

What these decisions, the danger of their spread, and the EPA and Justice Department interpretations of CERCLA represent is a threat to the very existence of pollution insurance, and to the financial health of the insurance industry. Insurers have been made painfully aware that their surplus is being targeted by government, insureds and the courts as the cornucopia from which unlimited resources are assumed to be available to pay environmental costs.

The American Insurance Association fully supports strong, vigorously enforced environmental laws. Its member companies want to write environmental insurance, and did so for many years -- until they began to feel the impact of CERCLA and court decisions seeking the "deep pocket" of insurance in clear disregard of express policy language. Even without the writing of additional insurance or renewing of existing policies, insurers are in jeopardy because of these developments.

Under current conditions, the costs of CERCLA, which have been estimated by the Office of Technology Assessment to be as high as $100 billion, as well as the costs of other environmental laws, will have to be met without the involvement of the insurance industry.

This dismal view of the availability of pollution insurance in the United States is not only shared by insurers domiciled in this country. Overseas reinsurers, who were once in the forefront of pollution insurance, are also abandoning the market in the face of current conditions.

Insurers want to write insurance. That is their livelihood, it is where their experience lies, and it is what they do best. However, all that experience and the basic tenets of insurance dictate that exposures under CERCLA are uninsurable, and that it would be irresponsible to place the assets of insurers at risk in this area. Insurers are not about to commit corporate suicide.

STATEMENT OF RICHARD A. SCHMALZ ON BEHALF OF THE AMERICAN INSURANCE ASSOCIATION

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

April 3,1985

I am Richard A. Schmalz. I am appearing today on behalf of the American Insurance Association. Other witnesses will describe the concerns the members of the Association have about certain overall effects of CERCLA [the Comprehensive Environmental Response, Compensation and Liability Act of 1980]. My purpose is to give a brief review of the fundamental insurance concepts and policy provisions that apply to the special liabilities that arise out of CERCLA and related tort law principles.

CERCLA is pioneering legislation with the potential for doing much good in an area that demands attention. We support its objective of cleaning up our environment and keeping it clean. But CERCLA is strong medicine, and like many strong medicines, has the power to do much harm.

We dislike to come before this Committee and report that well-motivated government programs to clean up the environment are having troublesome side effects. We hope that by reviewing insurance fundamentals we will be able to explain why the market for pollution liability coverage has all but disappeared. We also hope that such a review will be useful to those who would like to improve the insurability of environmental protection programs without undercutting their primary objective.

We do not want to give the impression that CERCLA is the sole cause of all the difficulties we face as insurers in this area. But it is true that some of the concepts and techniques that CERCLA has adopted to serve its specific objectives are becoming a de facto standard for other areas. We are noting what appears to be a synergistic effect on general tort law principles, which are now undergoing revolutionary expansion.

Nor do we wish to imply that the adverse side effects that we are witnessing as insurers are confined solely to insurers, perhaps brought about by some endemic quirk, or even inadvertence, peculiar to the business of insurance. All of us -- insurers, our policyholders and the public generally -- are facing the consequences of social changes, attitudes and new ideas of responsibility that were largely unpredictable at the time the seeds of these consequences were planted.

Almost from the origins of third party liability insurance to the last decade or so the most basic principle governing tort law liability has been that responsibility follows possession or control of property. Further, that liability is then imposed only on clearly identified individuals or firms for conduct -- judged wrongful according to the standards of the time -- which is the cause, more probable than not, of actual injury to clearly identifiable victims.

CERCLA, on the other hand, establishes an absolute "cradle to grave" liability, retroactively as well as prospectively, for damage to natural resources and the costs of cleaning up the environment for a wide range of commonly used materials of varying degrees of toxicity. Should these materials be commingled at any particular site requiring remedial attention the entire cost of clean-up is the joint and several responsibility of each firm whose hand has ever touched the materials in question. Possession or control is not material, nor is compliance with generally recognized sound practices, or even with formal safety standards. The relative harmfulness of the various materials is of no concern. And the ordinary rule of factual causation is being replaced by a virtually conclusive assertion that any amount of any material is the legal cause of the entire harm.

It should not be surprising that such an enormous, potent departure from classical tort law principles would be likely to have adverse financial effects generally, as well as on insurance markets. It is not entirely true that legal responsibilities will always be insurable at a price. If the subject matter of insurance does not conform with certain fundamentals, little or no insurance will be available, because it will not be possible to calculate the appropriate price.

The most basic concept underlying insurability and insurance contracts is the concept of risk. "Risk" means literally the "chance of loss" or the "probability of loss." If a loss is certain to happen, then there is no risk of loss to transfer, and an insurance transaction cannot take place. There is growing perception among underwriters that the cumulation of legal remedies provided under state and federal law, together with a spreading adoption of the CERCLA concepts of responsibility, are increasing a hitherto insurable probability of loss to an uninsurable, virtual certainty.

The second fundamental, which of course is not unique to insurance, is that of predictability. If a loss is not certain to happen -- and thus is basically insurable -- but there is no way to forecast its timing or amount from past experience, then the loss is unpredictable. No premium can then be computed for the possibility that the loss will happen during a particular policy period for which a premium must be set in advance. Any estimate would be pure speculation.

This in itself would not be fatal for insurance if the insurance market were monolithic and everyone were compelled to buy insurance. In such a case, premiums could be adjusted over time. But the insurance market is highly competitive. The custom is to write short term policies for annual periods. Customers are free to shop around, and they are free to drop out of the insurance market whenever they choose to do so.

These practices, and the competition they produce, are generally good for consumers because they tend to keep prices down. Nevertheless, they have some important implications. No insurer can include purely speculative premium loadings in its policies for unpredictable losses. Insurers must put exclusions in their policies for those hazards that are known to exist, but are unpredictable, and for hazards that are not common to the vast majority of policyholders. And these steps must be taken on the basis of the knowledge, the customs, the social attitudes and the liability rules of the time.

The risks of loss under general liability insurance are so varied that insurers do not have the well-defined loss experience that is available for lines such as workers' compensation and automobile insurance. Nevertheless, private insurance markets have been quite adaptable in dealing with the pricing uncertainties associated with the wide variation in hazards. A consensus emerges from the marketplace from time to time on a standard policy of insurance that fits most hazards of most insureds. Then special forms of insurance and rating plans are developed for the unusual hazards as they are identified.

The standard general liability policy is today represented by the comprehensive liability policy, or CGL. This basic form of insurance took shape about 50 years ago to cover the legal liabilities of business enterprises for bodily injury and property damage to third parties arising out of premises, operations and products. It does not cover risks which are the subject of other forms of insurance, such as damage to the insured's property, workers' compensation obligations or injury or damage arising out of the use of aircraft, automobiles or watercraft.

The scope of standard coverage has remained remarkably stable, with some refinements of course, to the present day. There have been only two major hazards to split off for special attention and one major structural change.

Since 1957 the nuclear hazard has been excluded from standard coverage. Insurance is available under special policies from the Nuclear Pools. There has been virtually no disruption in insurance markets. The second major split-off was the pollution liability hazard in 1970. Problems in that area are the focus of our concern today.

Standard coverage originally applied to bodily injury or property damage "caused by accident". The accident concept was also the time trigger of coverage and the building block for limits of liability. An individual policy covered only accidents which occurred during the policy period.

The "classical accident", as perceived by insurance underwriters and policy drafters, was concrete, rather than abstract. They regarded an "accident" as a sudden event of a physical nature that happened by chance at a definite time and place and caused rather obvious injury or damage -- a collision of vehicles, a scaffold that broke, a roof that collapsed. To them "accident" had the meaning that most people first associate with the word. It was not a legalist concept. For example, negligence or fault may result in an "accident" or may provide the legal reason for imposing liability when there has not been such a concrete event. These abstract concepts, however, are not "accidents" in the classical sense.

The underwriters' conception of "accident" harmonized well with both the classical liability principles of tort law and the fundamentals for insurability. The built-in element of fortuity met the requirement of "risk". Certainty as to time and place laid the foundation for reasonable predictability. Although the "classical accident" has been supplemented and to some extent replaced by the broader "occurrence" concept, it is still an important element in understanding how insurance is written today.

By 1960 it became apparent that coverage based solely on the classical accident concept was no longer adequate for most insureds. There were true "risks of loss" that did not arise out of sudden causes, but were the result of continuous or repeated exposure to physical causes. It was also evident that the classical concept of accident, particularly with respect to suddenness, was being stretched by the courts, in some cases beyond the practical limitations of standard coverage.

A consensus formed that the strict requirement of sudden causation could be relaxed for standard coverage, but in all other respects the elements of the classical accident would have to be retained. The process of study and revision took several years, culminating in the 10/1/66 edition of the standard policy.

The specifications for the expanded coverage were laid down before the dimensions of the exposure from nonsudden, or gradual causes, was fully appreciated. The relationship between low level exposures to useful, but sometimes harmful substances, and injuries to human beings was not well understood. Indeed, it is not well understood today and is still to a large extent speculative. Tort law at that time did not concern itself with speculative possibilities of harm. Doctrines of joint and several enterprise liability had not been formulated. Such techniques as class actions and statistical probabilities of causation had not come to the fore. This was a full decade before the deluge of asbestos related claims began -- around 1974.

In the late 1960's, however, environmental concerns started to crystallize as the result of major oil spills. The new CGL policy could conceivably apply to bodily injury or property damage arising out of pollutants released into the environment in the normal course of industrial activities. True, injury or damage would not be covered under the new "occurrence" concept if the injury or damage were expected from the standpoint of the insured. But the practical effect of this limitation was unpredictable.

This led in 1970 to the standard pollution exclusion and the split-off of the pollution liability hazard from standard coverage. Technically, it would have been simpler if an absolute pollution liability exclusion had been adopted. A more complicated approach was chosen, however, to minimize the need for special coverage. The line of demarcation selected was the classical accident concept which had been the foundation of standard coverage since its origin.

The translation of the underwriters' intentions to standard policy provisions was done by stating an absolute exclusion, while reserving an exception from its effect where the discharge or release of pollutants into the environment was itself "sudden and accidental." This approach restores both the elements of sudden causation and fortuity that are inherent in the classical accident concept.

Standard coverage does not apply to bodily injury or property damage which is expected or intended by the insured, as that kind of damage is specifically excluded by the definition of "occurrence". Where gradually caused damage is concerned, the definition of "occurrence" focuses on the quality of the resulting injury. The exception to the pollution exclusion, however, focus on the quality of the cause of injury. The discharge or release, as distinguished from the result, is the controlling factor.

Clearly an intentional discharge or release is not accidental in common parlance. It does not happen by chance, although it might result in unexpected injury or damage. Unintentional, but gradual discharges or releases may be accidental, perhaps from equipment designed to prevent them which turns out to be ineffective. But they are not sudden as that word is generally understood. Instances of both types, however, are to be expected from the normal conduct of business operations. Morecver, the hazard varies enormously among individual firms. A hazard that is not common to most insureds to roughly the same degree requires special insurance treatment which cannot be provided uncer standard coverage.

Unfortunately, some courts have misunderstood the purpose of the exclusion and have failed to apply the plain meaning of three comparatively simple English words -- "sudden", "and", "accidental". This is not to say that the precise time boundaries of "sudden" are fixed or that the exact nature of what is "accidental" is determined. But, in common speech the direction in which they point does seem fairly clear.

In any event, the line of demarcation between standard coverage and the special form of coverage known as "pollution liability coverage" or "environmental impairment liability" coverage has been fairly well known for sometime. And it is based conceptually on the common distinction between discharges or releases of pollutants which are "sudden and accidental" on the one hand and the "nonsudden or gradual." No premium has been included in standard coverage for the latter exposure.

CERCLA has properly focused special attention on damage to natural resources and clean-up costs, including the location from which a discharge or release of pollutants emanates. Coverage for this kind of response is also within the province of special pollution or environmental impairment liability coverage.

Nonetheless, this attention is placing pressure on standard liability contracts, many written years ago, to respond in some fashion to these newly created liabilities, including the clean-up of the insured's premises. Standard general liability policies have never been designed to pay for the costs of removing potentially harmful conditions from the environment or the property of the insured, even though such an action might conceivably prevent bodily injury or property damage covered by the policy. The responsibility to maintain safe premises and to remove hazards that present a risk to others has always been the responsibility of the insured.

Standard policies have always contained a specific exclusion from coverage for damage to property owned or occupied by or rented to the insured. To the extent that such a hazard is insurable, it has long been recognized to be the appropriate subject for property insurance.

In summary, from an underwriting standpoint, the cumulative liabilities associated with the well-meaning efforts of the Federal and State governments to clean up our environment and keep it clean are perceived, almost universally, to be at the very border of uninsurability in private markets. Unless we return to more clearly defined concepts of legal responsibility that are stable, predictable and more in accord with fundamental insurance concepts these liabilities are likely to remain uninsurable.

The situation appears to call for simplification, consolidation and restatement -- with perhaps new models as a guide. We would welcome the opportunity to participate in such an effort, should it be the desire of this Committee. We do not like to hear what the market is telling us.

ROBERT T. STAFFORD, VERMONT, CHAIRMAN

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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510

March 25, 1985

Mr. T. Lawrence Jones
President
American Insurance Association
85 John Steet
New York, NY 10038

Dear Mr. Jones:

In connection with the possible development of amendments to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 by the Committee on Environment and Public Works, I would appreciate receiving the following information.

1. The total of all premiums collected (including allocated investment returns from claims reserves) since 1950 for comprehensive general liability (CGL) policies and, for the same period, the total of all claims paid (including adjustment expenses and defense costs, as well as administration and acquisition expenses). Please provide the same information (a) for property damage policies issued during or after 1975 and (b) for EIL policies issued during or after 1975.

2. The total, by year, of all claims filed and claims paid since 1970 for the following:

a. pollution damages, broken down into (from the industry's view) non-sudden and sudden;

b. municipal liability;

c. product liability,

d. professional liability (e.g. medical malpractice);

e. fidelity liability.

Also, please provide an estimate of claims incurred but not reported for each of the above categories.

3. Total reserves and payments from reserves by year since 1970.

4. The ratio of surplus to premiums for property/casualty insurance since 1970.

5. Assuming there is no change in current law--

a. the probable sources and amounts of funds for pollution liability claims (e.g. reserves, surplus, premium increases, etc.);

b. the estimated number of insurers likely to become insolvent due solely to pollution liability claims;

c. the estimated number of insurers likely to become insolvent due solely to asbestos claims;

d. the options open to insurers to avoid insolvency (e.g. insolvency pools, chapter 11 filings, etc.).

6. A list of all major CGL reinsurers and estimated market share, by year, since 1970.

7. A list of all pollution liability or environmental impairment insurers and reinsurers and estimated market share, by year, since 1975.

8. A statement of the AIA's position on the following legislative proposals:

a. the establishment of a federal cause of action for product liability claims;

b. the establishment of a federal cause of action for pollution liability claims;

c. the establishment of an administrative scheme of compensation for injuries caused by asbestos;

d. the establishment of an administrative scheme of compensation for injuries caused by hazardous substances other than asbestos.

Please also state the AIA's position (or view, if there is no formally adopted position) on which of the above proposals should be reviewed by the Committee on Judiciary and provide copies of all letters or other written submissions to that Committee, its individual members or staff on the subject of seeking a referral of legislation in each of these areas.

I would appreciate receiving this information as soon as possible, as it is an essential prerequisite to hearings on this subject.

Sincerely,

Robert T. Stafford
Chairman

RTS:cmr

INFORMATION FOR THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

The following information was prepared in response to a letter from Mr. Robert T. Stafford to Mr. T. Lawrence Jones dated March 25, 1985. The section numbers correspond to those in the letter.

1. General Liability Underwriting Experience

Data on general liability premiums, losses, and expenses since 1973 are shown in Table 1. Underwriting experience prior to 1973 was not published for the industry in total; however, it is available separately for stock companies, mutual companies, and reciprocal exchanges. Investment income is not reported by line of business nor is information available for segments of a line such as property damage and environmental impairment liability. Incurred rather than paid losses are shown in Table 1 and in other tables because incurred losses are the basis for charging insurance operations.

2. Loss Experience for OtherLines and Sublines

Similar data for medical malpractice liability and fidelity are shown in Tables 2 and 3. Information for medical malpractice insurance has been reported separately since 1973; prior to that it was part of general liability. Claim counts are not available from published sources, and losses for claims incurred but not reported (IBNR) are included with incurred amounts.

Although claims information on municipal liability and products liability is not published annually, it is available from special studies by the All-Industry Research Advisory Council (AIRAC) and the Insurance Services Office (ISO), respectively. ISO also performed a closed claim study for medical malpractice.

3. Property/Casualty Reserves and Payments

Property/casualty insurance loss and loss adjustment expense reserves since 1970 are shown in Table 4, while Table 5 shows loss and loss expense payments during the same period. Although paid losses are not shown in published reports, they can be calculated as the difference between incurred losses and the change in loss reserves during each year.

4. Property/Casualty Premium to Surplus Ratios

Premium to surplus ratios for property/casualty insurance are shown in Table 6. Earned premiums for each year are divided by policyholder surplus as of the prior year end.

5. Economic Impact of Unfunded Liabilities

Insurers depend on generating cash flows to fund their loss liabilities. Cash is generated principally from premium revenues and from income earned on invested cash balances. To the extent that premiums are not collected for unanticipated liabilities, these liabilities remain unfunded.

Insurers are generally unable to offset their unfunded liabilities from future premium revenues for two reasons. First, premium rate regulation requires that rates include allowances only for expected liabilities on new business and not to offset past losses. Second, even in the relatively unregulated commercial lines, competitive pressures form insurers without significant unfunded liabilities are likely to keep rates at equivalent regulated levels.

Some insurers with major unfunded liabilities become financially impaired. The National Association of Insurance Commissioners (NAIC) developed a set of financial ratios and reports on insurers to assist regulators in detecting financially troubled companies or potential ones. These ratios are calculated from annual statement data filed by companies with the NAIC on items such as rate increases, loss reserve strengthening, and surplus changes. The results of the ratio analysis are used to select companies for further examination, which may lead to rescue attempts of companies found to be in financial difficulty.

Despite these early warning tests and other financial controls, some insurers become insolvent. To protect policyholders in cases of insurer insolvency, each state has a guaranty fund mechanism for assessing solvent insurers to pay the insolvent insurers' obligations. However, this system requires a sufficient base of solvent insurers to assure that they do not become impaired or insolvent themselves as a result of the assessment process. Therefore, if unfunded liabilities are very large in relation to policyholder surplus, the ability of the insurance industry to continue to pay claims promptly could be threatened.

6. Reinsurance Market Share

Table 7 shows market shares for the twenty largest reinsurers based on earned reinsurance premiums during the first half of 1984. These reinsurers accounted for more than three-fourths of the reinsurance market.

7. Environmental Impairment Liability Market Share

During 1983, the only year for which EIL premium estimates for individual insurers are available, ten insurers (including one insurance pool) were active participants in this market. Market shares for these insurers are shown in Table 8. Although surveys indicate total premiums of just under $37 million in 1983, the market shrank significantly the following year. The results of a more recent survey of the EIL market will be released by AIRAC during April 1985.

8. AIA Position Statements

This material is being prepared by AIA's Washington representative and will be sent separately.

March 29, 1985

Table 1

GENERAL LIABILITY*
Underwriting Experience
1973 - 1983
(dollars in millions; ratios in percent)

Year	Earned Premium	Loss & Loss Exp. Ratio	Underwriting Exp. Raito	Combined Ratio**
1973	$ 2,683.9	86.5	29.6	116.1
1974	2,879.1	96.1	28.9	125.0
1975	3,643.8	89.7	25.9	115.6
1976	5,037.9	83.3	24.1	107.4
1977	6,299.6	75.0	23.1	98.1
1978	7,380.3	73.3	24.5	97.8
1979	7,725.8	74.4	25.5	99.9
1980	7,797.1	83.0	26.7	109.7
1981	7,369.7	90.7	27.9	118.6
1982	7,077.0	104.0	28.2	132.2
1983	7,239.2	111.5	28.5	140.0

* Includes medical malpractice.
** Before dividends to policyholders.

Source: A.M. Best, Aggregates and Averages.

Table 2

MEDICAL MALPRACTICE
Underwriting Experience
1975 - 1983
(dollars in millions; ratios in percent)

Year	Earned Premium	Loss & Loss Exp. Ratio	Underwriting Exp. Ratio	Combined Ratio*
1975	$ 722.3	101.7	16.0	117.7
1976	1,109.9	95.4	14.3	109.7
1977	1,201.0	79.9	13.0	92.9
1978	1,195.9	88.0	14.6	102.6
1979	1,180.1	98.9	13.7	112.6
1980	1,199.1	114.1	14.1	128.2
1981	1,266.0	120.7	14.9	135.7
1982	1,358.2	133.7	15.5	149.3
1983	1,508.5	133.8	16.2	150.1

* Before dividends to policyholders.

Source: A.M. Best, Aggregates and Averages.

Table 3

FIDELITY
Underwriting Experience
1973 - 1983
(dollars in millions; ratios in percent)

Year	Earned Premium	Loss & Loss Exp. Ratio	Underwriting Exp. Ratio	Combined Ratio*
1973	$ 200.2	57.4	37.7	95.1
1974	203.5	64.7	38.0	102.7
1975	220.3	72.4	36.5	108.9
1976	238.0	70.0	35.4	105.4
1977	272.3	75.3	35.0	110.3
1978	296.3	69.8	35.6	105.4
1979	327.1	52.2	35.7	87.9
1980	349.7	56.5	36.7	93.2
1981	366.1	60.0	38.9	98.9
1982	361.3	72.9	40.6	113.5
1983	372.9	81.5	40.8	122.3

* Before dividends to policyholders.

Source: A.M. Best, Aggregates and Averages.

Table 4

TOTAL PROPERTY/CASUALTY
Loss and Loss Expense Reserves
1970 - 1983
(dollars in millions)

Year	Amount
1970	$ 20,256
1971	22,927
1972	26,609
1973	30,394
1974	34,574
1975	39,513
1976	47,105
1977	56,970
1978	68,767
1979	81,113
1980	92,493
1981	102,422
1982	111,959
1983	122,712

Source: A.M. Best, Aggregates and Averages, 1984.

Table 5

TOTAL PROPERTY/CASUALTY
Analysis of Incurred Losses*
1970 - 1983
(dollars in millions)

Year	Incurred Losses**	Paid Losses***	Change in Reserve
1970	$ 22,070	$ 19,841	$ 2,229
1971	22,867	20,196	2,671
1972	25,023	21,341	3,682
1973	28,307	24,522	3,785
1974	32,973	28,793	4,180
1975	37,953	33,014	4,939
1976	43,093	35,501	7,592
1977	48,688	38,823	9,865
1978	55,195	43,398	11,797
1979	63,536	51,190	12,346
1980	70,203	58,823	11,380
1981	74,853	64,924	9,929
1982	81,154	71,617	9,537
1983	86,672	75,916	10,756

* Includes loss adjustment expense.

** Earned premiums times loss and loss expense ratio.

*** Incurred losses minus change in reserves.

Sources: A.M. Best, Best's Review, January 1985; and
Aggregates and Averages, 1984.

Table 6

TOTAL PROPERTY/CASUALTY
Premium to Surplus Ratios
1970 - 1983
(dollars in millions)

Year	Earned Premium	Policyholder Surplus*	Ratio
1970	$ 31,173	$ 13,964	2.23
1971	33,877	15,499	2.19
1972	37,572	19,065	1.97
1973	40,847	23,812	1.72
1974	43,673	21,389	2.04
1975	47,860	16,270	2.94
1976	57,153	19,712	2.90
1977	68,865	24,631	2.80
1978	78,738	29,300	2.69
1979	86,917	35,379	2.46
1980	93,729	42,395	2.21
1981	97,465	52,174	1.87
1982	101,697	53,805	1.89
1983	106,346	60,395	1.76

* At end of prior year.

Sources: A.M. Best, _Best's Review_, January 1985; and _Aggregates and Averages_, 1984.

Table 7

REINSURANCE
Market Shares
First Half 1984
(dollars in thousands; shares in percent)

Reinsurer		Earned Premium	Share
1.	General Re	$ 465,901	16.2
2.	North American/Swiss Re	235,146	8.1
3.	Employers Re	209,222	7.2
4.	American Re	193,248	6.7
5.	Prudential Re	180,373	6.2
6.	Munich Re	107,222	3.7
7.	New York Ins. Ex.	99,571	3.4
8.	Skandia America Group	95,951	3.3
9.	INA Re	90,828	3.1
10.	New England Re	53,057	1.8
11.	Kemper Re	78,409	2.7
12.	Transatlantic Re	72,207	2.5
13.	Constitution Re	60,170	2.1
14.	National Re	52,773	1.8
15.	Buffalo Re	40,689	1.4
16.	American Independent Re	43,993	1.5
17.	Constellation Re	42,889	1.5
18.	American Agricultural	41,126	1.4
19.	Winterthur Swiss Re	35,288	1.2
20.	Fremont Re	37,600	1.3
	Total for top 20	$2,235,663	77.1
	Total for all companies	$2,898,580	100.0

Source: Business Insurance, September 17, 1984, p. 57.

Table 8

ENVIRONMENTAL IMPAIRMENT LIABILITY
Market Shares*
1983
(percent)

Insurer		Earned Premium	Share
1.	ERAS International	$ 9,500,000	25.7
2.	Shand, Morahan	8,000,000**	21.6
3.	Stewart Smith	7,500,000**	20.3
4.	AIG	6,000,000	16.2
5.	Swett and Crawford	2,250,000	6.1
6.	Travelers	1,000,000	2.7
7.	Home	800,000	2.2
8.	PLIA	800,000	2.2
9.	Dryden	700,000	1.9
10.	Hartford	400,000	1.1
	Total	$ 36,950,000	100.0

* Estimated.
** Maximum of range estimate.

Sources: Douglas McLeod, "Non-Sudden Pollution Policies Sell Slowly," Business Insurance, November 28, 1983, pp. 27-28; and NAIC Hazardous Waste Advisory Group, Pollution Liability Insurance Market and Data, December 1983.

AMERICAN INSURANCE ASSOCIATION
FEDERAL AFFAIRS DEPARTMENT

1025 Connecticut Ave., N.W.
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(202) 293-3010

May 16, 1985

Curtis A. Moore
Counsel
Committee on Environment and Public Works
410 Senate Dirksen Office Building
Washington, DC 20510

Dear Curtis:

I have enclosed questions and responses associated with the hearing conducted by the Senate Committee on Environment and Public Works on April 3 at which the insurance industry's difficulties in responding to the financial responsibility requirements in RCRA and CERCLA were discussed.

Also enclosed is a study prepared by the Insurance Services Office on the insurance industry's present and future capacity problems.*

Regards,

James L. Kimble
Senior Counsel

JLK/la
Enclosures

*Retained in committee files.

QUESTION 1

In a January, 1985 article published in Best's Review, Mr. John Burridge, who is a senior vice president of the A. M. Best Company, said that the American insurance industry has undergone a "steady and extended period of underwriting deterioration." He then went on to make another statement which I will read to you because I would like to know whether you agree. Mr. Burridge said the following:

> "It is with the liability lines that some companies exchanged underwriting prudence for a seat at the financial poker table and started a chain reaction of price cutting that pulled the whole commercial side of the property/casualty insurance business into its worst underwriting decline. Admittedly other factors entered into this deplorable scenario, but the overriding rationale (in what turned out to be a decision to substitute finance for insurance) was simply that investment income, at interest rates at one time running up to 20%, offered a quicker route to a profitable bottom line. And now the day of reckoning is here."

As I understand it, Best's Review is something like the Forbes Magazine of the insurance industry and very widely respected. Could each of you tell the Committee whether you agree with Mr. Burridge's assessment?

If Mr. Burridge is correct, it sounds to me like the industry has an excedrin headache.

ANSWER

The Best editorial notes there are other factors contributing to the underwriting decline, but it does not indicate what they are. In the commercial and other liability lines such as product liability, municipal liability, medical malpractice, environmental liability and comprehensive liability, it was primarily a deteriorating and unpredictable tort system which created major problems for insurer capacity. The liability expanded significantly after the premiums had been collected.

when premiums were collected from manufacturers of asbestos and Agent Orange, from the Township of Jackson and from Hooker Chemicals, the liabilities which ultimately resulted were not within the contemplation of the law or science.

It is true that underwriting losses for the personal lines such as automobile and homeowners ran at a loss ratio of around 110 in 1984 so that investment income changes of the variety referred to in the Best editorial could make a difference between profit and loss. This is not the case in those lines which include environmental and product liability. The commercial lines' ratios rose to as high as 127 in 1984, and many expect worse results in 1985. The liability system changed so dramatically for this line that even rates of interest of 20 percent would not cover the losses. This has meant that for those insurance companies whose business includes a large percentage of commercial lines coverage, their capacity has been severely impaired.

It is these lines that have produced the novel liability expansions encompassed by Sindell v. Abbott Laboratories, 26 Cal. 3d 588 and its progeny and such massive new liability rules as were enunciated in Beshada v. Johns Manville, 91 N.J. 191 (1982). It is also in these lines where unprecedented indemnity and litigation expenses have occurred. It is estimated that asbestos liability has resulted so far in close to $3 billion of expenditure. The Agent Orange settlement was $180 million, the Love Canal settlement was slightly over $20 million, and Jackson Township was just under $16 million. As recently as 1979, there would have been no precedents whatsoever for this variety of liability, either as to its severity or underlying legal principles. Unlike automobile and homeowners liability where the basic liability system has remained close to its earlier precedents and is therefore subject to relatively modest rate changes which can reflect the differences in the underlying system, there has been a revolution in commercial tort liability which no underwriter or even clairvoyant legal academic could have foreseen.

It is vital to understand that these policies were written years ago. The policies covering asbestos manufacturers and cleanup costs were written 10, 20, 30 and even 60 years ago. In the case of pollution liability, it should also be remembered that while insurers may not have been gifted with complete foresight on the future, they attempted to exclude that coverage because they felt that the liabilities would be unmanageable.

QUESTION 2

Based on the information which the Committee has received to date, the insurance industry seems to have two problems: one is in the past, the other in the future.

The past problem is that--from your point of view--insurance contracts which were not intended to cover non-sudden or non-accidental pollution are being interpreted to find that coverage exists.

Because of these decisions, you are unwilling--at least for the moment--to provide any coverage whatsoever against pollution, which is creating a prospective problem.

One of the things some members of the insurance industry would like to see happen is some fix for the past problem. As I said in my opening statement, however, it is not at all clear that your industry would provide insurance in the future even if we solved your past problem completely.

Is that correct? Are there circumstances under which we could be certain that you would offer insurance?

ANSWER

It is true that even if insurers' retroactive liabilities under Superfund were removed, the industry would by and large be unable to provide certain varieties of insurance for future liability. If the liability system remains unchanged, or if insurers are unable to limit their exposure to that liability system, they cannot predict or spread the risk. The insurance industry is, however, prepared to work with the Congress to try and develop methodologies under which insurers could assist in providing some coverage for future activity.

QUESTION 3

The Committee has heard a great deal of discussion during the past several weeks about recent court decisions, especially Jackson Township. For the record, was Jackson Township a suit under the Superfund law?

As I understand it, the decision was based on a judicial interpretation of the insurance contract in question following a law suit based on common law, with no involvement either directly or indirectly of the Superfund. Is that correct?

ANSWER

The Jackson Township case was not decided in a CERCLA background. However, its precedent has been applied in two cases which use federal liability concepts. The case of Waste Management of Carolinas, Inc. v. Peerless Insurance Company, 323 S.E. 2d 726 (Court of Appeals of North Carolina, December 28, 1984) was a U.S. Government initiated cleanup case arising under Section 7003 of the Resource Conservation and Recovery Act.

Also, the case of Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co., Ohio Court of Appeals #11598, 7/11/84, involved a CERCLA suit for cleanup at the Chem Dyne dump in Ohio. Chem Dyne is, of course, an NPL site.

Once these cases vitiate the pollution exclusion in the Comprehensive General Liability Policies, they have done so for pollution exposures without regard to the liability concepts used. Decisions such as Jackson Township have breached the pollution exclusion by defining "sudden and accidental" as "gradual". It is unlikely that the court would then say that "sudden and accidental" may not mean gradual in the context of a CERCLA or RCRA case. They do suggest that "sudden and accidental" means gradual without regard to the liability concepts being applied. Cases such as the Waste Management of Carolinas, Inc. v. Peerless Insurance Company clearly demonstrate the impact of precedents such as Jackson Township by their reference to determinations reached in the Jackson Township case. They show that those cases which establish the underlying principles will apply without regard to the law under which the claim is being brought.

AMERICAN INSURANCE ASSOCIATION
FEDERAL AFFAIRS DEPARTMENT

1025 Connecticut Ave., N.W.
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May 16, 1985

Senator Pete V. Domenici
434 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Domenici:

During the hearing conducted by the Senate Committee on Environment and Public Works on April 3 at which the insurance industry's difficulties in responding to the financial responsibility requirements in RCRA and CERCLA were discussed, you requested specific examples of CERCLA cleanup cases which had resulted in severe transaction costs and delay in cleanup. I have enclosed case studies involving the Lone Pine landfill located in Freehold, New Jersey and the sites owned by the Ottati and Goss Corporation and Kingston Steel Drum Company.

I have also enclosed a compendium of CERCLA cases which examine many of the key issues raised by Superfund, including retroactivity, strict liability, and joint and several liability.

Regards,

James L. Kimble
Senior Counsel

JLK/la
Enclosures

18 April 1985

LONE PINE

BACKGROUND

The Lone Pine Landfill is located in Freehold, New Jersey. Incorporated in 1959, this landfill was active until 1979 when it was closed by the New Jersey Department of Environmental Protection. During the bulk of its operational life, Lone Pine received primarily municipal and septic wastes, with industrial wastes constituting between 6 and 10 percent of its volume. In 1977 and 1978, however, a criminal conspiracy between a waste hauler (Scientific Chemical Processors) and Lone Pine employees led to the illegal disposal of substantial quantities of toxic industrial waste. It was the disposal of these wastes which ultimately triggered the involvement of the State Department of Environmental Protection and the closing of the site.

The Lone Pine Landfill is situated on a 155-acre tract. The dump itself is about 50 acres in size and contains an estimated 30 to 50 thousand barrels of toxic chemical wastes. The headwaters of the Manasquan River run approximately 300 feet from the landfill. This river, while not now used for drinking water supplies, industry, or agriculture, is the source for a planned reservoir serving New Jersey's Monmouth and Ocean counties.

The Freehold Township sued the State in 1979 to close the Lone Pine landfill. The site was closed in the same year and the New Jersey Department of Environmental Protection sued only the Lone Pine operator, not the waste generators.

U.S. EPA INVOLVEMENT

The United States Environmental Protection Agency got involved at the site in 1981. In October 1981, the EPA placed Lone Pine on the Superfund National Priorities List and began an investigation to determine the extent of contamination at the site and to evaluate clean-up options. At the same time, it initiated a search for potentially responsible parties (PRPs). As part of this search, questionnaires were sent in early 1982 to known and suspected users of the Lone Pine Landfill, seeking information about the types and quantities of wastes sent to Lone Pine. EPA also sought to involve potentially responsible parties in both its study of the site and evaluation of remedial alternatives. The Agency first identified 82 PRPs (site operators and waste generators) all of whom declined to participate directly in the EPA study. Finally, in the Fall of 1982, EPA brought suit against Lone Pine and other defendants, seeking to compel cleanup of the Lone Pine site.

PRP ACTIONS

When there are multiple potentially responsible parties involved, the lawsuit becomes substantially more complicated. Under the joint and several liability clause that has previously been invoked in Superfund cases, a minority of parties involved can be liable for the entire damage assessed during the proceedings. However, these parties can in turn seek other responsible parties who can be added as third-party defendants or can be sued later in a contribution suit. Therefore when a suit is brought against some but not all parties, the chance of further contribution suits is substantially increased and further delays in the proceedings with additional transaction costs are likely. In the case of Lone Pine, 80 PRPs were notified, a number which did not include all the parties potentially liable.

In March 1983, the Aetna Life and Casualty Company was notified by a broker that a company it insured had been named by EPA in the Lone Pine suit. The insured company was a major manufacturer of consumer products that had been covered for nine years by Aetna under a standard Comprehensive General Liability (CGL) policy. Under the terms of this policy, Aetna the insurer owes a defense to each policyholder named in the Superfund lawsuit -- at least until the insurers can prove that there is no coverage under their policies for this type of liability. Aetna responded to this notification with a Reservation of Rights letter -- a standard response indicating that the insurer would pay for the defense of the insured but was not prepared to admit coverage liability under the terms of the policy. In this instance, the key issues with respect to coverage were whether the events that caused damage at Lone Pine were sudden, as opposed to gradual, and intended, as opposed to unforeseen and unintended. CGL policies are typically written to exclude from coverage any damages that are caused by gradual events and any damages that are intended from the standpoint of the insured party.

In response to EPA's actions against them, five of the largest potentially responsible parties (held liable for 85 percent of waste at the site) joined forces to create the Lone Pine Steering Committee in the Spring of 1983. The purpose of the Steering Committee was to coordinate the efforts of these five firms in the Lone Pine case. The Steering Committee, in addition to handling the legal defense of the five companies, undertook a variety of technical investigations at the site to determine the extent of the pollution problem and to assess remedial options. These studies included an analysis of the environmental condition of the upper Manasquan River and a study of the cost of closing the landfill.

PRELIMINARY SITE INVESTIGATIONS

In June 1983, EPA released a draft of the first Remedial Investigation/Feasibility Study (RI/FS) of the Lone Pine site. The RI/FS costing $330,000 reviewed five remedial options for Phase I (surface cleanup), with total clean-up costs ranging from $8.4 million to $30.8 million. EPA's preferred option included capping the site, constructing an underground wall around the site, and pumping and treating on-site contaminated groundwater, at an expected cost of $17.0 million.

To collectively respond to these and other actions taken by EPA, the first meeting of the notified PRPs in the Lone Pine case took place in the spring of 1983, with 82 generators represented. Their tasks were to comment on the EPA-authored RI/FS and to help to identify additional PRPs to bring in to ongoing discussions with EPA. The search for additional PRPs undertaken jointly by EPA and existing PRPs continued from June 1983 to June 1984.

In contrast to the EPA's site recommendations, the Steering Committee, after undertaking engineering studies of its own, proposed an alternative plan which also included capping the site but would monitor groundwater conditions before embarking on a groundwater containment and treatment program. This alternative was based on the environmental assessment of the upper Manasquan River, which showed no significant contamination of the river as yet by landfill leachate or runoff.

EPA VERSUS PRP PROCEEDINGS

After EPA completed a supplemental feasibility study in June 1984, and after numerous meetings with PRPs and the Lone Pine Steering Committee, the EPA recommended moving forward with a $17 million clean-up program. EPA sent a second round of notification letters to an expanded list of 142 potentially responsible parties notifying each of their statutory right to undertake proper remedial action at Lone Pine prior to EPA's use of federal fund monies and subsequent cost recovery. This list of 142 PRPs was considered to be complete, given all available information gathered at that time.

During this time, Aetna received notices from two additional insured parties that they had recently been named as defendants in the EPA suit. In each case Aetna initiated an investigation into the type of coverage provided to the insured and ultimately sent each a Reservation of Rights letter, assuming the cost of defense but not acknowledging liability.

In September 1984 the Agency's Record of Decision (ROD) outlining a $17 million cleanup at Lone Pine was signed. The EPA then began clean-up efforts at the site without having been assured of any commitment on the part of the PRPs. However, the Steering Committee sought to block EPA's clean-up effort on the grounds that EPA's decision was made without full judicial review and review by the defendants. The Steering Committee asked for a preliminary injunction and a temporary restraining order barring EPA from implementing its remedial action program at Lone Pine.

In January 1985, a court decision was reached in the suit of the Steering Committee against EPA rejecting the Steering Committee's position and allowing EPA to move forward with its clean-up proposal. The Steering Committee is currently appealing this decision. In addition, the Committee is attempting to include municipal waste generators (i.e., nearby towns) in the list of PRPs, claiming that municipalities are also responsible for the toxicity of the Lone Pine site.

There has been no remedial action at Lone Pine to date, 3.5 years after placement of the site on the Superfund National Priorities List.

A summary of projected and expended costs and a brief chronology follow.

SUMMARY OF LONE PINE COSTS

Number of PRPs to Date:	142 (originally 82)
RI/FS Cost by EPA:	$500,000
PRP-Funded Engineering Studies:	$200,000

CLEAN-UP COSTS

Total Estimated Surface Cleanup Cost (EPA):	$17 million
Total Estimated Surface Cleanup Cost (Steering Committee):	$9.9 million
Clean-up Costs to Date (EPA):	$1.0 million

LITIGATION COSTS

Estimated Litigation Costs to Date*:	$1-2.5 million
1985 Litigation Budget for 1 (1% Share) PRP**:	$75,000
Litigation Expenses by 1 (21% share) PRP: (for legal fees and site studies to 11/84)	$210,000
Projected PRP Litigation Costs to Settle: ($1.1 million in-house + $3.25 million outside counsel)	$4.3 million

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* Includes litigation expenses by PRPs only.

** The PRP believes that its litigation share is larger than its liability share.

LONE PINE

SUMMARY OF TIME SCHEDULE

Fall 1979	State begins proceedings against Lone Pine.
October 1981	U.S. EPA places site on NPL.
Fall 1982	EPA brings suit against PRPs.
Spring 1983	Lone Pine Steering Committee is formed.
July 1983	EPA completes preliminary RI/FS.
Summer-Fall 1983	Steering Committee undertakes RI/FS.
June 1984	EPA completes supplementary RI/FS.
September 1984	EPA's ROD is signed and cleanup begins.
October 1984	Steering Committee brings suit against EPA.
January 1985	Court decision allows EPA to continue cleanup.

18 April 1985

OTTATI AND GOSS/KINGSTON STEEL DRUM

BACKGROUND

Beginning in 1978, Ottati and Goss Corporation (O&G) conducted hazardous waste processing operations on a one-acre site in Kingston, New Hampshire. On an adjacent six-acre tract, Kingston Steel Drum Company (KSD), jointly with O&G, reconditioned and rented 55-gallon drums provided by an off-site paint manufacturer. In a short span of time, approximately 4,200 corroding and leaking drums accumulated on these properties, and in July 1979 the State of New Hampshire began proceedings against these two firms.

Studies showed that both surface and groundwater at the site were contaminated with volatile organic compounds. In addition, the contamination was spreading off the site and potentially threatened a pond used for swimming and fishing located 0.3 miles down gradient from this site.

U.S. EPA INVOLVEMENT

In October 1981, the U.S. Environmental Protection Agency joined the State in its actions against Ottati and Goss and Kingston Steel Drum by placing the two sites on the Superfund National Priorities List and beginning clean-up activities at the sites. It followed this with Superfund Section 106 letters to 10 potentially responsible parties (PRPs) in Spring 1982. These letters notified the responsible parties that EPA intended to clean up the two sites and invited the parties to take the lead in conducting an investigation of the site and undertaking remedial action. After negotiations failed, EPA went ahead with preliminary fund-financed action. By the summer of 1982, EPA had spent $1.7 million dollars in CERCLA emergency funds to remove drummed wastes from the two properties.

PRP ACTIONS

In the meantime, the 10 PRPs originally notified by EPA were seeking additional responsible parties to share their liability. These third parties were then sued by the PRPs via contribution suits.

In September 1982, the Hartford Insurance Group was notified by one of its insureds that the insured, as an off-site waste generator to the O&G site, had received one of EPA's notification letters in March. It had in the meantime retained counsel and was now asking its insurer to assume the costs of its defense. Under the terms of a Standard Comprehensive General Liability (CGL) policy, most insurers recognize a duty to defend each policyholder named in the Superfund lawsuit -- at least until the insurer can prove that there is no coverage under their policies for this type of liability. The Hartford therefore responded to its insured with a Reservation of Rights Letter -- a standard response indicating that the insurer would pay for the defense of the insured but was not prepared to admit coverage liability under the terms of the policy.

EPA VERSUS PRP PROCEEDINGS

In January 1983, the U.S. EPA filed a formal complaint against 16 defendants who were allegedly implicated in the dumping at the O&G and KSD sites. The list of 16 was considered to be current and complete and included the original PRPs and additional companies that were first brought in as third parties by the PRPs but were ultimately sued directly by the government. The State of New Hampshire and the Town of Kingston entered the suit as plaintiff intervenors. Two of the defendants, Great Lakes Container Corporation, parent company of Kingston Steel Drum, and Senter Transportation Company, lessor of the land to Ottati and Goss, filed cross complaints against both O&G and KSD.

In early 1983, the Hartford, representing one of the potentially responsible parties notified by EPA, approached the EPA with a $150,000 settlement offer for its insured (8.7 percent share of $1.7 million spent by EPA), an offer which was ultimately rejected by EPA.

In April 1983, EPA signed a cooperative agreement with the State of New Hampshire to undertake a $572,000 Remedial Investigation/Feasibility Study (RI/FS).

The trial of U.S. EPA and the Town of Kingston, New Hampshire versus 16 defendants began in December 1983. Trial testimony concluded 14 months (112 trial days) and 7,000 pages later. After an interim period to submit and reply to trial briefs, the court will make a decision on the liability issue only. Proceedings regarding the appropriate remedy will follow. The trial is the first multigenerator trial under CERCLA. Many PRP spokesmen claim that it was EPA's initial unwillingness to settle out of court, thus forcing the court case, that led to unnecessary delays in litigation proceedings and substantial transaction costs.

COST ESTIMATES

By March 1985, bills for legal costs for the Hartford's one insured party had totaled approximately $575,000. Total litigation costs for insurance coverage issues for the case range from $750,000 to $800,000. Total litigation costs to PRPs to date are approximately $3.5 million.

No specific estimates of government litigation costs to date are available; however, it is understood that these costs could exceed $500,000. Private party and government litigation expenses have been incurred for the liability phase of the trial only. Substantial additional litigation expenses are expected when the remedy portion of the trial is heard.

An estimated $10 million in addition to the $1.7 million already spent is required for cleanup.

A summary of projected and expended costs and a brief chronology follow.

SUMMARY OF O&G/KSD COSTS

Number of PRPs:	16 (originally 10)
RI/FS Cost by EPA:	$572,000

CLEAN-UP COSTS

Total Estimated Subsurface Clean-up Cost:	$10 million
Clean-up Costs to Date (EPA):	$1.7 million

LITIGATION COSTS

Attorney fees for one defendant: (8.7% share)	$575,000
Total estimated PRP litigation fees to date: (including experts)	$3.2-3.8 million*

COVERAGE ISSUES

Suits Pending:	Two PRPs are currently suing their insurance carriers, one of which has policies with 40 carriers.
Suits Settled:	One PRP settled with one insurance carrier, decision reached January 1984 for no coverage under Comprehensive General Liability (including no coverage for defense costs).

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* Total includes litigation expenses by all PRPs -- in-house and outside counsel, technical studies, third-party suits, and administrative and management expenses.

OTTATI & GOSS/KINGSTON STEEL DRUM

SUMMARY OF TIME SCHEDULE

July 1979	State begins procedings against O&G/KSD.
October 1981	U.S. EPA places site on NPL.
Spring 1982	Superfund Section 106 letters are sent to PRPs.
July 1982	EPA finishes cleanup of surface waste.
January 1983	U.S. EPA files formal complaint against PRPs.
April 1983	RI/FS begins.
December 1983	Trial begins -- U.S. EPA versus PRPs.
February 1985	Trial on liability issues concludes.

Current CERCLA Issues

- I. Liability Under CERCLA
  - A. Parties Liable
  - B. Insolvent Parties
  - C. Retroactivity
  - D. Strict Liability
  - E. Joint and Several Liability
  - F. Contribution

- II. Elements of Cause of Action
  - A. Burden of Proof as to Causation
  - B. Timing of Governmental Cost Recovery Action
  - C. Nature of Response Costs Recoverable

- III. Private Actions Under CERCLA
  - A. Recovery of Response Costs from Other Responsible Parties
  - B. Proper Parties and Timing for Cost Recovery Action
  - C. Nature of Response Costs Recoverable
  - D. Consistency with the National Contingency Plan
    - 1. Cases Requiring Pre-Authorization
    - 2. Cases Not Requiring Pre-Authorization
  - E. Injunctive Relief
  - F. Declaratory Relief
  - G. Private Actions Against the Government

- IV. Pre-enforcement Review

- V. Consent Decrees: Remedial Plans

- VI. Insurance Coverage
  - A. Definition of "Occurrence"
  - B. Application of Pollution Exclusion Clause
  - C. Duties of Insurance Companies

- VII. Constitutional Issues

I. Liability Under CERCLA.

A. Parties Liable.

United States v. Carolawn Co., 8 Chem. & Rad. Waste Lit. R. 438 (D.S.C. June 15, 1984)--high-level corporate officers responsible for the day-to-day operations of a hazardous waste disposal business held personally liable as an owner or operator.

United States v. South Carolina Recycling and Disposal, Inc., 21 E.R.C. 1577 (D.S.C. August 28, 1984) -- lessee of a hazardous waste site found liable as an "owner", because, as lessee/sublessor, the company maintained control and exercised responsibility over the use of the property, and "essentially stood in the shoes of the property owners."

United States v. Cauffman, 21 E.R.C. 2167 (C.D. Cal. October 23, 1984) -- former owners of site, whose lessee disposed of hazardous wastes at the site, found strictly liable for clean up costs.

United States v. Argent, 21 E.R.C. 1354 (D.N.M. May 4, 1984) -- owner of site, that subsequently became contaminated by hazardous waste through the acts of lessee, is still subject to CERCLA liability notwithstanding "third party defense".

United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO), 579 F. Supp. 823 (W.D. Mo. 1984), -- officer of generator with direct knowledge and supervision of arrangements with transporter and ultimate disposal site held liable under §§106 and 107(a)(3) as "arranger for disposal." In addition, major stock ownership coupled with active participation in management creates liability as an "owner" under §§107(a)(1) and 101(20)(A). See also United States v. Mottolo, Civ. No. 83-547-D (D.N.H. March 27, 1984).

Cadillac Fairview/California, Inc. v. Dow Chemical Co., 21 E.R.C. 1108 (C.D. Cal. March 5, 1984) -- liability of past owners under §107(a)(2) is limited to ownership "at the time of disposal." Ownership after disposal but prior to response action does not cause liability under §107.

B. Insolvent Parties.

Ohio v. Kovacs, 21 E.R.C. 2169, ___ U.S. ___ (January 9, 1985) -- State of Ohio barred from collecting clean-up costs from owner of toxic waste site, who had filed for bankruptcy, because state court order to clean up the site had been reduced to a monetary obligation dischargeable under federal bankruptcy law. However, the court limited its ruling to the facts before it. The court did not decide that Kovacs' liability for criminal contempt (failure to perform environmental obligations prior to bankruptcy), fines or monetary penalties, or injunctions against further pollution, were affected by bankruptcy. In a concurring opinion, Justice Sandra Day O'Connor said that the court's holding cannot be viewed as impeding states' abilities to enforce their environmental laws. A state may protect its interest in enforcing its environmental laws by giving judgments the status of statutory liens or secured claims.

In re Quanta Resources Corp., 21 E.R.C. 1254 (3rd Cir. July 20, 1984) -- bankruptcy trustee not allowed to abandon a hazardous waste facility as "burdensome to the estate" under §554 of the Bankruptcy Reform Act. The court held that the public interest in health and safety was more important than the interest served by abandonment of the estate (distribution of the estate's assets).

Penn Terra, Ltd. v. Dept. of Environmental Resources, 20 E.R.C. 2185, 733 F.2d 267 (3d Cir. April 30, 1984) -- court order against bankrupt operator to implement future environmental remedies at site held not to be a money judgment dischargeable in bankruptcy. Order thus capable of enforcement by Pennsylvania D.E.R., and not subject to automatic stay provisions of bankruptcy law. Court looked to nature of the injuries which the remedy seeks to redress: past injuries indicate enforcement of monetary obligation, future injuries indicate non-monetary, equitable action to prevent future harm.

C. Retroactivity.

State ex rel. Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983) -- the imposition of liability upon transporters for past acts where there is no post-enactment conduct requires a retroactive application of CERCLA. Judicial presumption favoring prospective application of statutes can be overridden in limited circumstances. Congressional intent, evidenced by legislative history of CERCLA, requiring industry to pay for response and remediation costs suggests an intent of retroactive liability for pre-enactment acts of potentially responsible parties. Liability provisions of CERCLA may thus be retroactively applied.

United States v. NEPACCO, supra, -- the inadequacies of existing federal environmental statutes with respect to inactive and abandoned hazardous waste disposal sites prompted the passage of CERCLA. Liability provisions of CERCLA thus intended to apply retroactively. Liability for past acts does not violate the Due Process Clause in absence of evidence that Congress acted arbitrarily and/or irrationally in the passage of CERCLA. Legislative history of CERCLA reveals that Congress rationally considered liability for the effects of past disposal practices as a means to spread costs of clean-up on those who created and profited from waste disposal, namely, generators, transporters, and owner/operators. CERCLA's imposition of liability for past acts is thus rational and satisfies due process requirements.

United States v. South Carolina Recycling & Disposal, Inc. (SCRDI), 20 E.R.C. 1753 (D.S.C. February 23, 1984) -- CERCLA imposes liability upon parties for present conditions and effects stemming from past acts, and is therefore not retroactive. In the alternative, even if CERCLA were considered retroactive, it would clearly satisfy the requirements of due process in that it is rationally related to a valid Congressional purpose: to spread the economic costs of clean-up operations among those responsible for damage, environmental harm, or injury.

United States v. Stringfellow, 20 E.R.C. 1912 (C.D. Cal. April 9, 1984) -- a statute is retroactive when it imposes new liability on completed past transactions. The Court rejected the reasoning of United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982) [17 E.R.C. 2155]. The Price court held that when a statute addresses present effects it is not retroactive, even when those present effects were the result of past acts.

United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982) -- Section 7003 of RCRA is applicable to prior owners of inactive sites; § 106(a) (imminent and substantial endangerment) of CERCLA can be invoked against the prior owner of a disposal site; and § 107 CERCLA liability may be escaped only where both the damages and the release occurred wholly before CERCLA enactment. If damages continue, § 107 applies retroactively. Assertion of liability under CERCLA for preenactment conduct of former owner of inactive site, coupled with the creation of an entirely new remedy at law against such party (i.e., recovery of certain response costs not otherwise recognized by statute or common law), requires retroactive application of CERCLA to establish liability. Court deferred ruling on whether government's attempted application of CERCLA was unconstitutional "as applied" to the particular facts.

D. Strict Liability.

The courts are unanimous that CERCLA liability is strict liability. See Bulk Distribution Centers Inc. v. Monsanto Co., 21 E.R.C. 1080, 589 F. Supp. 1437, 1443 n.15 (S.D. Fla. 1984); United States v. Argent Corporation, 21 E.R.C. 1356 (D.N.M. May 4, 1984); United States v. NEPACCO, supra, at 844; United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982).

E. Joint and Several Liability.

United States v. Chem-Dyne, 572 F. Supp. 802 (S.D. Ohio 1983) -- legislative history of CERCLA reveals that the term "joint and several liability" was expressly deleted from statute in order to avoid its universal application to inappropriate circumstances. Scope of liability under CERCLA to be determined by developing Federal common law in this area. The court adopted Restatement (Second) of Torts approach to issue. Liability under CERCLA is not joint and several where there is a reasonable basis for division according to contribution of each tortfeasor. Where two or more persons cause a single and indivisible harm, each is subject to liability for entire harm. Burden of proving divisibility rests with defendants who seek to limit their liability.

United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) ["Wade I"] -- CERCLA "permits, but does not require, the imposition of joint and several liability." Congress' deletion of express reference to joint and several liability in CERCLA was intended to avoid its application where it would produce inequitable results. Adopted *Chem-Dyne* and Restatement (Second) approach regarding divisibility of harm.

United States v. A&F Materials Co. 578 F. Supp. 1249 (S.D. Ill. January 20, 1984) ["A&F I"] -- the court found that Congress had rejected a rigid application of the Restatement (Second) approach as adopted in *Chem-Dyne*. Congress expressly stated its concern about the harshness and unfairness of imposing joint and several liability on a defendant who contributed only a small amount of waste to a site. Court has power to impose joint and several liability on a defendant unable to prove his contribution to an injury, but should nevertheless apportion damages in CERCLA case according to following criteria: (1) ability of parties to show that their contribution can be distinguished; (2) amount of waste involved; (3) degree of toxicity; (4) degree of involvement of parties in the generation, transportation, or disposal; (5) degree of care exercised with respect to the particular waste; and (6) degree of cooperation by the parties with Federal, state or local officials to prevent any harm to the public health or environment.

United States v. SCRDI, *supra* -- adopted *Chem-Dyne* approach. Further found that harm was indivisible where thousands of corroded, leaking drums at site were not segregated by source or waste type. Rejected volumetric contribution as basis for finding divisibility. Court expressly rejected *A&F Mat'ls* approach.

United States v. Conservation Chemical Co., 20 E.R.C. 1427 (W.D. Mo. February 3, 1984) -- adopted *Chem-Dyne* approach.

Determination of joint and several liability to be made on case-by-case basis.

United States v. Argent, supra -- Congress expressly rejected the mandatory imposition of joint and several liability under CERCLA. Government's motion for summary judgment on this issue denied upon a finding that genuine issues of fact existed with respect to "divisibility of harm and the existence of a reasonable basis for apportionment of damages."

United States v. Stringfellow, 20 E.R.C. 1905 (C.D. Cal. April 5, 1984) -- court agreed with A&F Materials that the legislative history of CERCLA calls for flexibility in the adaptation of the Restatement (Second) approach. Specifically, the court noted that utilization of the criteria specified in A&F Materials enables the court to take into consideration numerous relevant factors, including the plight of small contributors unable to prove the extent of their contribution. No joint and several liability for §106(a) abatement actions.

F. Contribution.

United States v. Chem-Dyne, supra -- court noted at fn. 3 that §107(e)(2) expressly provides for right of contribution.

United States v. NEPACCO, supra -- court stated at fn. 26 that joint tortfeasors are not indispensable parties to a CERCLA action but may be made a third party to suit by appropriate pleading of defendant.

United States v. SCRDI, supra -- at fn. 8 the court found that determining "equitable shares of the liability" with respect to an indivisible injury is more appropriately resolved in an action for contribution "after plaintiff has been made whole." The court further cited §107(e)(2) as permitting an action for contribution among parties held jointly and severally liable.

United States v. A&F Materials & Co., supra -- court expressly noted the ability of generator-defendants to avoid harshness of joint and several liability by third party actions against joint tortfeasors.

United States v. Ward, 8 Chem. & Rad. Waste Lit. R. 484 (E.D.N.C. May 14, 1984) -- scope of liability under §107 is to be determined by federal common law, which expressly recognizes action for contribution and indemnity under CERCLA.

II. Elements of Cause of Action.

A. Burden of Proof as to Causation.

United States v. Wade, supra [Wade I] -- court rejected the requirement of proof of actual wastes of defendant as causing the pollution at the site. It is beyond the present state of the art to prove actual causation in such a case. To hold a defendant liable, government must show: 1) that a defendant's waste was disposed of at a site; 2) that the substances that make defendant's waste hazardous are also present at the site; 3) a release or threat of release of any hazardous substance at the site; 4) which has caused the incurrence of response costs. See also United States v. SCRDI, supra (government not required to show that defendant's wastes are still at the site).

United States v. Cauffman, supra -- government not required to allege and prove proximate causation before it can sue to recover clean-up costs.

United States v. Wade, 21 E.R.C. 1346 (E.D. Pa. March 8, 1984) ["Wade II"] -- CERCLA liability requires that a defendant's waste must be shown in fact to have been disposed of at the site. It is insufficient to show that generator used major transporter to site for disposal of unaccounted-for wastes where there is no evidence that generator's waste was ever sent to that site.

United States v. A&F Materials Co., 20 E.R.C. 1957 (S.D. Ill. March 30, 1984) ["A&F II"] -- the definition of waste in CERCLA includes hazardous materials which are of nominal commercial value and which are sometimes sold or reused and sometimes discarded. The fact that the waste was recycled and paid for by the disposal facility does not relieve the generator of liability. The question is who decided to place the waste into the hands of a particular facility that contains hazardous wastes. If generator decided to so place the waste, the fact that the transaction was a sale, or that the waste was reused before disposal, is irrelevant. Liability for releases under §107(a)(3) ends with that party who both owned the hazardous waste and made the critical decision how it would be disposed of or treated, and by whom.

New York v. General Electric Co., 21 E.R.C. 1097 (N.D.N.Y. June 26, 1984) -- defendant sold used transformer oil to a dirt dragstrip for use as dust control. The court rejected defendant's argument that a dragstrip was not a hazardous waste facility, since "facility" is defined to be any area where a hazardous substance comes to be located. The court also rejected the defendants' argument that it had not "contracted or otherwise arranged" for disposal of the oil since it had sold the oil to the dragway. The court held that a "waste generator's liability under CERCLA is not to be so facilely circumvented by its characterization of its arrangements as 'sales.'"

B. Timing of Governmental Cost Recovery Action.

State ex rel. Brown v. Georgeoff, supra -- government must incur some, but need not incur all response costs before bringing a cost recovery action.

United States v. NEPACCO, supra -- government not required to present a claim to the Fund, nor enter into a cooperative agreement with the State, prior to bringing suit under §§ 106(a) and 107(a).

C. Nature of Response Costs Recoverable.

United States v. Tyson, 9 Chem. & Rad. Waste Lit. R. 415 (E.D. Pa. November 29, 1984) -- cost recovery actions under CERCLA are equitable in nature. Defendants have no right to a jury trial under the Seventh Amendment to the U.S. Constitution.

Wehner v. Syntex Corp., 9 Chem. & Rad. Waste Lit. R. 417 (E.D. Mo. December 26, 1984) ["Wehner II"] -- relief available under CERCLA is equitable in nature, therefore, a jury trial is not available.

United States v. Wade, supra -- costs spent on investigating, monitoring, testing, and evaluating the conditions at the site are recoverable as costs of removal.

United States v. NEPACCO, supra -- costs recoverable under CERCLA include all litigation costs, including attorneys' fees incurred by plaintiff, as well as all costs, including salaries and expenses, associated with monitoring, assessing and evaluating the release of contaminants and the taking of actions to prevent, minimize or mitigate damage which might result from a release or threat of release of contaminants from the site. Plaintiff is also entitled to prejudgment interest.

D'Imperio v. United States, 575 F. Supp. 248 (D.N.J. 1983) -- in action by private party for declaration that it was not liable for clean-up costs, and that if it contributed to cost of clean-up its actions would be compensable by other responsible parties, court held that there was no case or controversy and that there was no evidence that response costs had been incurred by either private party or government. Court narrowly read §107(a)(4)(B) to limit recovery of clean-up costs to costs directly related to removal or remedial action and held that costs associated with fencing off the property and preparation of feasibility study were not recoverable costs.

Cadillac Fairview/California, Inc. v. Dow Chemical Co., supra -- clean-up costs incurred in fencing off site and conducting chemical analyses are not recoverable.

New York v. General Electric Co., supra -- response costs recoverable include costs of field and laboratory work in order to monitor, assess, and evaluate the release and threat of release of hazardous substances.

United States v. Wade, 20 E.R.C. 1849 (E.D. Pa. March 23, 1984) ["Wade III"] -- response costs incurred prior to enactment of CERCLA on December 11, 1980 are not recoverable.

III. Private Actions Under CERCLA.

A. Recovery of Response Costs from other Responsible Parties.

Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio April 26, 1984) -- §107(a)(4)(B) gives private parties right to seek response costs from other responsible parties, including past generators of hazardous wastes. Some costs must be incurred prior to the institution of §107 cost recovery action, but clean-up need not be completed prior to filing of such action.

Wehner v. Syntex Corp., 7 Chem. & Rad. Waste Lit. R. 611 (E.D. Mo. December 30, 1983) ["Wehner I"] -- §107(a) provides for private cause of action for recovery of response costs consistent with the National Contingency Plan against other responsible parties. §107(a) private cost recovery action is separate and independent of requirements for making private claims against Superfund pursuant to §§111 and 112.

B. Proper Parties and Timing for Cost Recovery Action.

City of Philadelphia v. Stepan Chemical Co., supra -- §107(a)(4)(B) permits those parties who may be liable for costs of governmental action at site to bring private action against other potentially responsible parties for clean-up costs incurred by private party.

D'Imperio v. United States, supra -- in action by landowner for declaratory judgment of non-liability and for ruling that any costs that landowner does incur are "necessary costs" under CERCLA and thus reimbursable, court held that action is not ripe merely because landowner received USEPA notice letter, site had been listed on NPL, and feasibility study had begun. Court applied same holding to plaintiffs' suit for reimbursement of response costs.

Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 9 Chem. & Rad. Waste Lit. R. 56 (N.D. Cal. October 22, 1984) -- present owners, who are potentially responsible parties, have standing to sue past owners, because § 107 creates an independent private right of action that is separate and distinct from the liability created in §§ 111 and 112 (uses of Fund, and claims procedure). A private action for reimbursement of response costs need not show that plaintiff's response was pre-authorized by the government, nor that the site was on the NPL. Those requirements apply only to actions seeking reimbursement from the Fund.

Mardan Corp. v. C.G.C. Music, Ltd., 9 Chem. & Rad. Waste Lit. R. 404 (D. Ariz. December 6, 1984) -- plaintiff's private action for response costs under § 107 (a) (4) (B) held barred by the equitable doctrine of unclean hands, because plaintiff had contributed wastes to the site in question. (§ 107 actions are equitable in the nature of restitution -- see U.S. v. NEPACCO, supra.)

C. Nature of Response Costs Recoverable.

Jones v. Inmont Corp., supra -- Among other items, plaintiffs recovered cost of monitoring their health, and loss of use of wells and lakes located on their property.

Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp., Haz. Waste Lit. R. 6,232 (E.D. Tenn. August 16, 1984) -- private parties can recover investigative costs under CERCLA as response costs.

Pinole Point Properties, Inc. v. Bethlehem Steel Corp., supra -- private action for past, present and future clean-up costs upheld.

D. Consistency with the National Contingency Plan.

1. Cases Requiring Pre-Authorization

Cadillac Fairview/California v. Dow Chemical Co., supra -- §107(a)(4)(B) requirement that private cost recovery action be consistent with National Contingency Plan demands as a minimal prerequisite to commencement of suit that the site appear on National Priorities List. To permit private suits over sites not on the List would undermine the perceived Congressional intent of providing a systematic unified response to hazardous waste problems and ignores the requirement of §107 that suits by persons other than Federal and state governments be consistent with National Contingency Plan.

Bulk Distribution Centers, Inc. v. Monsanto Co., supra, (S.D. Fla. June 16, 1984) -- right of private party to bring cost recovery action under §107(a)(4)(B) is conditioned upon the preparation and submission of a government-approved clean up plan. In addition, private parties must serve a demand letter on responsible parties in accordance with provisions of §112(a). Court rejected an independent reading of §§107 and 112.

Wickland Oil Terminals v. Asarco, Inc., 8 Chem. & Rad. Waste Lit. R. 129 (N.D. Cal. May 4, 1984) -- an authorized governmental clean-up program, initiated by EPA, or state officials pursuant to a cooperative agreement with EPA, is a prerequisite to private action for clean-up costs incurred at site under §107(a). Reference to "any other necessary costs" in §107(a)(4)(B) requires that some governmental response costs be incurred prior to private party action for cost recovery. Prior to commencement of federal enforcement action, no case or controversy exists to entitle a private party a right to maintain declaratory judgment action.

2. Cases Not Requiring Pre-Authorization

Homart Development Co. v. Bethlehem Steel Corp., Haz. Waste Lit. R. at 6,184 (N.D. Cal. August 2, 1984) -- prior governmental approval of plaintiff's clean-up plan is not a prerequisite to a private §107 cost recovery action. §107(a)(4)(B) private action is unrelated to procedures for claims against the Superfund provided for by §§111 and 112. In addition, there is no statutory requirement that site be on National Priorities List prior to maintenance of private cost recovery action. Whether plaintiff's clean up costs are consistent with National Contingency Plan is a triable issue of fact.

Pinole Point Properties, Inc., supra -- Section 107 private recovery action need not involve a site listed on NPL and need not show pre-authorization of response costs as being consistent with NCP.

E. Injunctive Relief.

Cadillac Fairview/California, Inc. v. Dow Chemical Co., supra -- plaintiffs sought to require defendants to remove hazardous substances from the site. Since §106 does not expressly authorize a private cause of action, the court held that there was "simply no reason to believe" that Congress intended to provide a private claim for injunctive relief.

State of New York v. General Electric, supra -- the court denied the defendant's motion to dismiss the State's claim for an injunction ordering the defendant to monitor and abate contamination at a site. The court intimated that "notwithstanding the absence of any express grant of an equitable remedy [to a state] in CERCLA, the court's "inherent equitable powers" might be sufficient to authorize such injunctive relief."

F. Declaratory Relief.

Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp., supra -- although CERCLA does not allow private plaintiffs to seek injunctive relief, it does give private plaintiffs the right to seek a declaratory judgment on the issue of liability.

G. Private Actions Against The Government.

J. V. Peters & Co. v. Ruckelshaus, supra -- court dismissed private action against government which sought declaration that government had not acted in accordance with provisions of CERCLA and the National Contingency Plan that require EPA to make an assessment of magnitude of the hazard present at the site and the ability and willingness of private parties to take remedial action. Absent specific, documented allegation that EPA had no rational basis for undertaking a response action and that no preliminary assessment had been made, private party's ability to challenge response action is limited to proof in subsequent cost recovery action that government's activities at site were not consistent with National Contingency Plan.

United States v. Union Gas Co., 20 E.R.C. 1049 (E.D. Pa. November 15, 1983) -- the Eleventh Amendment of the U.S. Constitution held to bar a CERCLA defendant from maintaining a third-party complaint against a state, because Congress did not provide a clear statement that CERCLA was intended to abrogate sovereign immunity.

United States v. Wade, Haz. Waste Lit. R. at 5,593 (E.D. Pa. April 16, 1984) ["Wade IV"] -- generator defendants filed counterclaims against the Commonwealth of Pennsylvania alleging that, as a generator of hazardous substances located at the site, the Commonwealth was liable to the other generators. The court: allowed the counterclaims to stand to the extent they were alleged to be barred by the Eleventh Amendment; dismissed the counterclaims to the extent they alleged a duty by the State to investigate or prosecute those who improperly dispose of hazardous waste; dismissed the counterclaims to the extent they alleged ordinary, negligent acts of omission; and allowed the counterclaims to the extent they alleged gross negligence or intentional misconduct by the State.

IV. Pre-enforcement Review.

Earthline Co. v. Kin-Buc, Inc., 8 Chem. & Rad. Waste Lit. R. 706 (D.N.J. July 23, 1984) -- potentially responsible party sought review of EPA's § 106 order requiring the clean-up and closure of the Kin-Buc Landfill. The court dismissed the action and held that judicial review of administrative orders is premature and improper. The court held that since EPA had not sought enforcement of its order, final agency action necessary for judicial review did not exist, and that challenges to the validity of an EPA order are instead to be asserted in § 107 enforcement proceeding.

United States v. Outboard Marine Corp. (OMC), 8 Chem. & Rad. Waste Lit. R. 695 (N.D. Ill. August 31, 1984) -- EPA filed a complaint under § 106 seeking an injunction requiring OMC to remove PCB's from Waukengan Harbor. EPA subsequently decided to clean up the harbor on its own and sue for recovery of costs. When EPA moved to dismiss the § 106 count, OMC opposed the motion and asked the court to review whether the PCBs posed a risk of substantial and imminent harm. The court refused to review EPA's record of decision (ROD) until EPA sued to recover its response costs. The claims sought to be dismissed were dismissed with prejudice.

Lone Pine Steering Committee v. EPA, 9 Chem. & Rad. Waste Lit. R. 387. (D.N.J. January 21, 1985) -- plaintiffs conducted studies and developed a remedial plan, but EPA refused to consider it. Plaintiffs sought review of the ROD that set out EPA's plan for clean-up. The court held that it had no jurisdiction to review the ROD prior to the institution of a § 107 cost recovery action and granted EPA's motion to dismiss. The court said that to allow pre-enforcement review of the ROD would "totally frustrate one of the major objects of CERCLA -- prompt action to clean-up highly threatening waste sites."

Aminoil v. United States, 8 Chem. & Rad. Waste Lit. R. 815 (C.D. Cal. September 28, 1984) -- Court held no pre- enforcement review of the merits of EPA's ROD, because such a review would handcuff the [EPA] by delaying effective responses to emergency situations.

J.V. Peters v. Ruckelshaus, supra -- a potentially responsible party can obtain a judicial review of EPA's adoption of a ROD if the party specifically alleges and supports by material facts that EPA's action has no rational basis or that EPA failed to follow mandated procedures.

U.S. Ecology, Inc. v. Carlson, 21 E.R.C. 2009 (C.D. Ill. October 3, 1984) -- plaintiff sought a temporary restraining order and a preliminary injunction against EPA's proposal to list plaintiff's waste site on the National Priorities List (NPL). The court held that it did not have jurisdiction, since NPL listing is by regulation and reviewable only in the Court of Appeals for the D.C. Circuit, pursuant to 42 U.S.C. § 9615. The court also held that NPL listing is not a final agency action since it is subject to a sixty day comment period.

Cotter Corp. v. EPA, 21 E.R.C. 2231 (D. Colo. April 17, 1984) -- plaintiff's suit challenging the procedures by which EPA listed Cotter's Lincoln Park on the NPL was dismissed because the court lacked jurisdiction, as there had been no final agency action ripe for review.

V. Consent Decrees: Remedial Plans.

United States v. Vertac Chemical Corp., 588 F. Supp. 1294 (E.D. Ark. 1984) -- the court approved Vertac's proposed remedial plan over EPA's. The dispute arose regarding the meaning of provisions in an earlier consent decree. Vertac's 2 million dollar plan, involving site encapsulation of dioxin, was found preferable to EPA's plan as being "appropriate to fulfill the terms, conditions, requirements and goals of the Consent Decree." EPA had proposed a 50 million dollar plan with excavation and reburial at an EPA permitted facility.

VI. Insurance Coverage.

A. Definition of "Occurrence".

CPS Chemical Co., Inc. v. Continental Insurance Co., et al., Haz. Waste Lit. R. at p. 6,085, ___ N.J. Super. ___ (August 8, 1984) -- alleged improper disposal of insured's wastes by a waste hauler "was unexpected and unforeseen by the plaintiff and, therefore, constitutes an accident" as required by the definition of "occurrence" within the insurance policies.

Jackson Township v. American Home Insurance Co., 8 Chem. & Rad. Waste Lit. R. 646, _____ N.J. Super. _____ -- in spite of insured's negligence in selection, operation, and supervision of landfill, insurance company held liable to indemnify its insured. The court held there was an "occurrence" within the meaning of the insurance policy even though the acts of negligence could foreseeably result in injury, because the injury was not "expected or intended".

B. Application of Pollution Exclusion Clause.

Typical pollution exclusion clause in Comprehensive General Liability Policy:

> This insurance does not apply:
>
> * * *
>
> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkali, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Buckeye Union Insurance Co. v. Liberty Solvents & Chemicals Co., 8 Chem. & Rad. Waste Lit. R. 451 (Ohio Ct. App. July 11, 1984) -- insurer sought declaratory judgment that it had no duty to defend generator of hazardous waste sued in Chem-Dyne for clean up costs and injury to natural resources based upon standard pollution exclusion clause in its policy. Court held that allegations of releases and threatened releases in CERCLA complaint are occurrences within the common understanding of that term. Court noted with respect to pollution exclusion clause that policy provisions which exclude coverage are to be strictly construed against insurer where language is ambiguous. "Sudden and accidental" held to mean unintended or unexpected from the standpoint of the insured.

American States Insurance Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984) -- insurer of generator of hazardous wastes sued insured's other insurers for recovery of defense costs incurred in defending insured in various lawsuits which alleged that insured was liable for damages resulting from its disposal of hazardous waste at dump sites. Court focused on allegations of continuous and intentional dumping and disposal and determined that the dumping was regularly part of insured's business and therefore could not have been sudden and accidental. Held: pollution exclusion clause applied to exclude coverage.

Jackson Township v. American Home Insurance Co., supra -- the pollution exclusion clause was held inapplicable since no evidence had been presented which showed the insured was an active polluter or had knowingly deposited hazardous wastes at the landfill.

Great Lakes Container Corp. v. National Union Fire Insurance Co., 20 E.R.C. 1817 (1st Cir. February 15, 1984) -- court held that government's allegations that insured emptied chemicals and other wastes and residues from used drums it reconditioned onto the ground at the facility prevented insured from claiming that contamination was sudden and accidental. Further, because contamination took place as part of insured's regular business activity, there was no occurrence within meaning of policy.

United Pacific Insurance Co. v. Van's Westlake Union, Inc., 664 P.2d 1262 (Wash. Ct. App. 1983) -- gasoline leaking from hole in an underground line over a period of months held to be "sudden and accidental." Neither the discharge nor the resulting damage was expected or intended by the insured, thus pollution exclusion clause did not exclude coverage for third party claims against insured. See also, Allstate Insurance Co. v. Klock Oil Co., 73 App. Div. 2d 486, 426 N.Y.S.2d 603 (1980) (slow leak from underground gasoline tank held to be "sudden and accidental").

Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co., 451 A.2d 990, 186 N.J. Super. 156 (1982) -- pollution exclusion clause merely a "reaffirmation of the principle that coverage will not be provided for intended results of unintentional acts but will be provided for the unintended results of an intentional act." Determinative issue is "whether the pleadings charged the insured with an act resulting in unintended or unexpected damage." Function of depositing wastes in a landfill or disposal area may be intentional but if there is no allegation or proof that insured expected or intended that waste seep into the soil or groundwater resulting in damage and injury to others, then pollution exclusion clause does not apply, accord, CPS Chemical Co., Inc. v. Continental Insurance. Co., supra.

Reliance Insurance Co. v. Martin, 126 Ill. App. 3d 94, 467 N.E.2d 287 (1984) -- if damages were not intended by the insured, causation should be considered "sudden and accidental".

Lansco, Inc. v. Dept. of Environmental Protection, 350 A.2d 520, 138 N.J. Super. 275 (1975), petition for certification denied, 73 N.J. 57,372 A.2d 322 (1977) -- whether occurrence is "sudden and accidental" must be viewed from standpoint of the insured.

C. Duties of Insurance Companies.

Riehl v. Travelers Insurance Co., 8 Chem. & Rad. Waste Lit. R. 839 (W.D. Pa. August 7, 1984) -- plaintiff insured granted summary judgment which held that defendant insurer had duty to defend and indemnify plaintiff insured and had duty to take affirmative steps to abate further injury from improper waste disposal on plaintiff's land. Since insurance company was contractually obligated to pay for all past, present and future pollution damages for which plaintiff might be found liable, and since plaintiff could not afford abatement measures, the court held that the insurance company must undertake to abate the hazard.

VII. Constitutional Issues.

J.V. Peters & Co. v. Ruckelshaus, 20 E.R.C. 2222 (N.D. Ohio 1984) -- owners and operators of a waste facility sought to enjoin EPA from undertaking a CERCLA action, based in part on alleged failure of EPA to provide an opportunity for a hearing, thus violating due process rights. The court refused to hear the due process claim, and held that the private interest at stake (potential liability for EPA clean-up costs) would not be affected unless EPA prevailed in a subsequent § 107 action. Since plaintiff would have an opportunity to contest the consistency of the response action with both the NCP and § 104(a) in any later § 107 action, there was no risk of erroneous deprivation of their interests. The government's interest in conducting a rapid clean-up of the site was found to outweigh the plaintiffs' interest in a prior adjudicatory hearing.

Aminoil v. United States, supra -- the government was enjoined from invoking daily-penalty and punitive damages provisions of §§ 106(b) and 107(c)(3), as a means of enforcing a § 106 order, because plaintiffs would be deprived of due process.

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TESTIMONY OF MAX CLAY, PRESIDENT, THE PLANNING CORPORATION

Thank you. My name is Max Clay. I am President of the Planning Corporation, an independent insurance agency that specializes in the placement of Pollution Liability Insurance for businesses which have a need for this insurance. Since 1982, our company has been the major producer of Pollution Liability Insurance for petroleum marketers. Today, we have Pollution Liability Insurance in force covering more than 15,000 retail gasoline outlets, several hundred petroleum bulk storage facilities, and a large, but unknown, number of miscellaneous farm and commercial storage tanks containing petroleum products.

The purpose of my testimony is to distinguish for members of the Committee between Pollution Liability Insurance for non-petroleum and petroleum-related risks. As the panel will hear from other witnesses, the Pollution Liability Insurance market for non-petroleum exposures today is practically non-existent. However, Pollution Liability Insurance currently is available for petroleum-related risks. The coverage is comprehensive, limits of liability are adequate, and pricing is equitable and competitive. There are a number of important reasons why releases of petroleum into the environment remain insurable risks. A crucial factor from the insurance companies' viewpoint is the "petroleum exclusion" in the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"). It is likely that the Pollution Liability Insurance market for petroleum-related risks will disappear if the petroleum exclusion is removed or limited by Congress during the reauthorization of Superfund. Moreover, the continued existence of pollution policies on petroleum-related risks is essential to the success of the financial responsibility provisions in the recently-enacted amendments to the Resource Conservation and Recovery Act ("RCRA") for underground storage tanks.

The Pollution Liability Market for Non-Petroleum Exposures is Practically Non-Existent

Other witnesses at today's hearing will detail for members of the Committee the tremendous upheaval which has occurred over the last nine months in the Pollution Liability Insurance market. The market for non-petroleum exposures practically is non-existent. With the recent withdrawal of two companies which were offering Pollution Liability Insurance, we believe that there is only one viable insurance market still willing to consider insuring non-petroleum pollution exposures.

The lack of adequate Pollution Liability Insurance capacity for such exposures is the result of a number of factors, including: (1) poor loss experience; (2) a series of court rulings that have expanded insurance coverage beyond that contemplated when policies are underwritten; and (3) environmental statutes and regulations, as well as pending legislation, which act to increase an insurance company's liability. The courts' interpretations of Superfund's liability provision as strict, joint and several, and proposals on Capitol Hill for a Federal cause of action in the pending Superfund reauthorization legislation, are examples of this last factor.

In addition, a major coverage crisis is occurring in the General Liability Insurance market. Until this year, most General Liability policies provided coverage for pollution losses which were "sudden and accidental." Only "gradual" or "non-sudden" pollution losses were excluded from coverage. However, several recent court rulings have interpreted the language of the standard General Liability policy to include both sudden and gradual pollution losses. General Liability underwriters have reacted to this turn of events by eliminating all pollution exposures from their policies because they never intended or expected to cover gradual pollution losses.

Thus, the current situation is that, just as the underwriters who provided gradual Pollution Liability Insurance are withdrawing from the marketplace, the General Liability Insurance underwriters are eliminating from their policies the sudden and accidental coverage that they previously were willing to provide. Accordingly, at this time, and for the foreseeable future, most businesses which either need or want insurance coverage for pollution losses are out of luck. The coverage simply is not there.

Petroleum-Related Pollution Risks are Exceptions

Despite the turmoil in the Pollution Liability Insurance market, there is one bright spot -- petroleum-related risks. Pollution Liability Insurance currently is available to most petroleum marketers. Such insurance coverage is comprehensive, limits of liability are adequate, and pricing is equitable and competitive. The obvious question is why, given the miserable condition of the Pollution Liability Insurance market, can petroleum marketers obtain insurance coverage on pollution losses when chemical companies, landfill operators, municipalities, pest control firms, and other businesses cannot?

There are a number of important reasons why releases of petroleum products into the environment remain insurable risks. Petroleum releases, unlike spills or discharges of many Superfund "hazardous substances," easily are detectable because of taste and smell. Thus, when people's water supplies are contaminated by a gasoline leak from an underground storage tank, for example, they are not as likely to drink, or bathe in, the water.

The Planning Corporation has had nearly three years of claims experience with underground petroleum storage tank leaks. Unlike claims arising from Superfund and RCRA sites, claims for petroleum losses nearly are exclusively for property damage only. Personal injury claims are a rarity. This difference is extremely important to Pollution Liability underwriters. Moreover, the typical claim for an underground petroleum storage tank leak is limited to clean-up costs. Because the release generally is confined to the area surrounding the tank, litigation is seldom required. While such claims are high in frequency, they are low in severity. The normal cost of a clean-up for an underground petroleum storage tank leak ranges from $10,000 to $80,000. The average cost based on our three year's claims experience is $55,000.

Another significant difference between non-petroleum and petroleum-related risks is the large number of petroleum firms purchasing pollution insurance coverage. The majority of underground storage tanks are owned by small and medium-sized petroleum marketers. This large number of insureds, thus, gives the insurance companies an adequate spread of risk. Because of the large number of purchasers, the insurance companies can collect enough premium to pay the many claims that are average in size, as well as the few that are substantial.

Perhaps, the most important reason Pollution Liability Insurance is available today for petroleum-related risks is the existence of the petroleum exclusion in Superfund. Our company's Pollution Liability Insurance program for petroleum marketers initially was caught up in the upheaval affecting other risks in the Pollution Liability Insurance market in recent months. However, we were successful in arguing to the insurance companies that underground leaks of petroleum products are entirely different risks than those associated with abandoned and inactive waste sites under Superfund or treatment, storage, and disposal facilities under RCRA. When considered with many of the reasons discussed above, the insurance companies agreed and today are insuring the many thousands of petroleum-related facilities. However, if the petroleum exclusion is removed or limited during the current Congressional debate over Superfund's reauthorization, it is very likely that the Pollution Liability Insurance market for petroleum-related risks will disappear. Several petroleum marketing groups, such as the Society of Independent Gasoline Marketers of America and the National Association of Convenience Stores have argued correctly that the loss of the petroleum exclusion would affect adversely their members' ability to obtain Pollution Liability Insurance for their gasoline marketing facilities. Without such insurance coverage, a substantial loss could easily bankrupt many petroleum marketers.

Pollution Liability Insurance for Petroleum-Related Risks is Necessary for RCRA LUST Financial Responsibility

In 1984, Congress enacted amendments to RCRA, directing the Environmental Protection Agency ("EPA") to develop a comprehensive regulatory program for underground storage tanks, including those containing petroleum products. As part of the regulations to be promulgated by EPA, Congress gave the Agency discretion to issue requirements for tank owners and operators to demonstrate financial responsibility for corrective action for releases into the environment and for compensating third parties for bodily injury and property damage. The financial responsibility requirement was made discretionary with EPA because there was concern on the part of congress that Pollution Liability Insurance would not be available. A financial responsibility requirement provides incentives to tank owners and operators to maintain "good housekeeping" practices, so that leaks can be identified early and the responsibility shifted to their insurance carriers. Accordingly, Congress should not jeopardize the Pollution Liabilty Insurance market for petroleum-related risks by removing or limiting the petroleum exlusion in Superfund. Moreover, Congress should encourage EPA in its RCRA tank regulatory program to promote a healthy market for Pollution Liability Insurance for petroleum-related risks.

Summary

Despite the scarcity of Pollution Liability Insurance for non-petroleum exposures, several insurance companies today will write comprehensive pollution policies on petroleum-related risks. These policies provide coverage for third-party actions seeking monetary damages for bodily injury and property damage. These policies also will pay for required clean-ups both on and off the insured's site.

It is in an insurance company's interest to proceed with an effective clean-up as expeditiously as possible. The earlier the problem is addressed, the less the cost of clean-up. Moreover, it generally is not necessary to institute a legal action to get the insurance company to respond to a petroleum release into the environment.

The health of the Pollution Liabililty Insurance market for petroleum-related risks is linked directly to the maintenance of the petroleum exclusion in Superfund. There is little that could possibly be gained by taking action that would severely restrict or eliminate an active and viable insurance market that is willing and able to fund the clean-up costs for the overwhelming majority of petroleum spills, and replacing such insurance coverage with Superfund that already suffers from a lack of resources -- both human and financial.

I appreciate this opportunity to appear before the Committee. I will be happy to answer any questions that my testimony may have raised.

TESTIMONY OF

JAMES POIROT
CH2M HILL
DENVER, COLORADO

AND

JOHN HENNINGSON
MALCOLM PIRNIE INC.
PARAMUS, NEW JERSEY

AND

PAUL GENECKI
VICTOR O. SCHINNERER ASSOCIATES
WASHINGTON, D.C.

ON BEHALF OF
THE AMERICAN CONSULTING ENGINEERS COUNCIL
BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

April 3, 1985

TESTIMONY OF JAMES W. POIROT

Mr. Chairman and members of the Committee on Environment and Public Works, my name is James Poirot. I am Chairman of the engineering firm of CH2M Hill in Denver, Colorado. I am representing the American Consulting Engineers Council. Accompanying me today is John Henningson, Vice President of Malcolm Pirnie Inc., an environmental engineering firm in Paramus, New Jersey and Paul Genecki of Victor O. Schinnerer Associates of Washington, D.C., representing insurance experts specializing in design professional liability insurance.

ACEC is a professional association of over 4,200 independent engineering firms, with nearly 120,000 professional, technical and support personnel. Approximately 10% of the ACEC membership, some 400 firms, have the experience and capability to perform the varied and complex engineering services involved in Superfund sites. These services include but are not limited to surveying and mapping, civil engineering, sanitary engineering, chemical engineering, geotechnical engineering, hydrogeology, toxicology laboratory analysis, and mechanical-electrical engineering.

Recently, ACEC was called upon to comment on the capacity of the private sector engineering community to accomplish cleanups under Superfund. Representing one of the three major zone contractors responsible for assisting the U.S. Environmental Protection Agency (EPA) in managing the cleanup effort nationwide, it is my view that physical capacity is not the problem.

Rather, the problem --- and it is our problem in the broadest sense in that the Congress, the states, regulated industry, the legal and insurance communities and the response contractors must join together to deal with it in ways that meet the objective of protecting public health, safety and welfare --- is applying that capacity for technical problem - solving among response contractors in a manner that the highest possible quality is assured.

With that background, we are here today to offer the perspectives of design professionals concerning issues related to quality assurance in Superfund site engineering, as well as suggestions which we believe can be readily incorporated in the reauthorization to optimize quality in design of hazadous waste responses.

Our comments will focus on the following areas:

1. The nature of quality assurance from the perspective of design professionals;
2. differences between hazardous waste response engineering and more conventional design activities; and
3. conditions which impact quality of design in the hazardous waste response field, including procurement and liability.

What Is Quality Assurance?

In ACEC, and in virtually all the major design professional organizations, there has never been greater emphasis on quality assurance. This year, for example, ACEC has embarked on a peer review program which consists of informal, nontechnical reviews of all aspects of a consulting engineering firm's operation by "peers" from other firms. Through this program, we hope to facilitate exchange of information, ideas and approaches to quality management and quality control between firms throughout the ACEC membership.

Our objective in this, and in related activities, is to improve the quality of the design product at all stages of the process over which we have control --- in the predesign investigation of alternatives, in the development of plans and specifications on which construction will be based, and in construction-phase services --- through thorough and objective assessment of design alternatives, constant review and checking for accuracy and precision in the design process, and effective project management.

Quality assurance, however, is also impacted by conditions over which we have little or no control or influence, and these conditions are discussed below.

Differences Between Hazardous Waste Response Engineering and Conventional Design Activities

While quality assurance as defined above must be applied in all we do as design professionals, it is even more critical in the hazardous waste response field.

In short, engineering of a Superfund site is significantly different from conventional design of buildings and other facilities. In a conventional design context, there are standardized methodologies and known and tested structural, electrical, mechanical and other subsystems which form a reliable base of experience on which innovation can be built. In engineering a Superfund site, however, there are no standardized remedies. They are all site specific. Likewise there are multiples, in the thousands of combinations, of chemical mixes and what treatment systems will neutralize, detoxify or stabilize the hazardous substances so that they may be safely treated on site or removed to a permanent treatment facility.

As an example, more than forty (40) different technologies were reviewed to remove dioxin from contaminated soil at Times Beach, MO. Many looked very promising, but most had never been field-tested and therefore "available" for use as viable design alternatives which could be employed at that particular site. Moreover, reliable performance standards and risk assessment methodologies have not yet been developed to test for adequate performance of particular technologies at specific sites.
The design of response solutions requires reliance on standards established by other environmental laws, and, ultimately, decisions by state and EPA regulators as to what sectors of the environment and public health are most at risk and therefore what standards should guide the technology selection. These regulatory officials must rely on the advice and judgement of qualified and experienced technical professionals under contract.

The clean-up of Superfund sites not only involves complex technology and the application of professional judgement and experience but also management of the sizeable data generated from evaluation of the sites and protection of this data to meet evidentiary requirements if any enforcement action results from the site clean up activities to recover the clean up costs.

So ultimately quality assurance in Superfund is creating a system which allows the most qualified technical professionals to freely advise the regulators as to what standards and technologies are most effective both environmentally and economically at a particular site.

In the absence of effective clean-up technology, containment of hazardous wastes may be temporarily necessary, particularly where there is immediate environmental and health impact from imminent groundwater or surface water contamination. But containment is at best only a temporary solution. Despite the certainty that containment will ultimately fail to prevent movement of hazardous wastes the uncertainty of treatment technology presents substantial risk. To encourage consulting engineers to apply their skills and professional judgement to the risk of appropriate technology choice, it is essential that other risks must be minimized.

Other Conditions Impacting Hazardous Waste Response Design Quality

As noted above, while we, as design professionals, can and must do much to assure quality of design in hazardous waste responses, there are other conditions impacting quality performance over which we have little or no control, including liability exposure and procurement.

With respect to liability exposure, the current Superfund law defines the liability standard for disposers, transporters and generators of hazardous waste as "strict joint and several." This standard has been imputed to consulting engineers and construction contractors involved in site clean-ups. As a result, securing adequate design and general liability coverage has become increasingly difficult and costly, and advancement of the "state of the art" in hazardous waste response design is in danger of being constrained as highly-qualified consulting engineers withdraw from or refrain from entering that field of practice. We appreciate the Committee's efforts to address the problem in Section 115 of S.51. However, we believe that indemnification must be mandatory and addressed to specific funds.

ACEC's 1984 Professional Liability Insurance Survey revealed that premiums for such insurance increased significantly for all firms, but most substantially for those whose capacity and capabilities are the most sought-after in the hazardous waste response field. Many firms are reporting being dropped entirely from coverage by their carriers. It is likely that the 1985 Annual Survey to be completed in December will reveal an even greater incidence of substantial premium increases, reduced coverage and cancelled policies.

What is the impact of escalating insurance premiums and reduced availability of professional liability coverage?

As noted above, ACEC provided a generic analysis of the response capability of private sector engineering firms to the technical demands of the Superfund program. Quoting from that letter:

> "The capacity of the engineering community to respond to the demand and growth of the Superfund program, however, is constrained by factors which are not resource-specific. These factors are primarily

> institutional and managerial. They are also inherent in the law, which has to this point focused effort on the identification of responsibility for disposal of hazardous wastes and the apportionment of liability to provide restitution to the funds, rather than the crafting of solutions and the application of technology to site clean ups. The removal of these constraints, thereby, increased availability or effective capacity of the engineering community to respond.
>
> Attainment of the objectives of the Superfund program are critically dependent on the quality of site assessments, design and other engineering services. The complexity of options for treatment at these sites and the potential for harm to public health from release of chemicals off the site, as well as to the employees of engineering firms, construction companies and others involved, require that engineering firms be free to exercise their best professional judgement. The quality of that judgement and indeed the very existence of the firm are jeopardized by the potential for claims and lawsuits by third parties. The Superfund defines a strict liability standard for responsible parties. If engineering firms are to do their best work they must be distinguished from responsible parties and be liable only for their own negligence."

The imposition of strict liability on consulting engineers will have two serious impacts. It is likely to make financial responsibility difficult because reasonable cost and adequate liability insurance coverage will be unavailable. Uninsured engineers do not focus their talents on creative solutions. They worry about the consequences and risk of choices to the future of the firm. Quality review is then tempered not only by the professional judgement but what is likely to result in terms of increased and uninsured claims. This may well mean increased uncertainty and conservative design standards. In the hazardous waste field, conservative response may well mean fewer permanent clean-ups and more containments with recommendation for clean up later when technology is thoroughly proven.

Moreover, the standard of care for engineers has always been reponsibility for "errors and omissions" and liability for negligence. We assert that is the appropriate standard for Superfund. There is no "perfect" design and perfection is not what our objective should be in this program. There are many ways to achieve the results. The application of scientific principles through the art of engineering will lead to not a "perfect" solution, but the one among several best suited for the particular site.

We, therefore, urge, as has the ABA Section on Public Contract Law, that consulting engineers and others cleaning up sites be held to a negligence standard out of the claim of Superfund liability with a limitation of total responsiblity above which the federal government will cover any claims.

We have included suggested language to accomplish this which will insulate the fund and yet provide the indemnification necessary. This coverage must be extended not only to federal-lead EPA and Corps of Engineers projects but also to projects under EPA approved state cooperative agreements and responsible party private clean-ups which are EPA sanctioned and approved.

This standard must be extended to all levels of claims --- federal, state, and third party --- under state tort law. The attached bill pending in the North Carolina legislation indicates why the coverage must be so extensive. Consulting engineers are concerned that legislation such as North Carolina's proposed statute will so increase the liability exposure that without a federal ceiling on liability, engineers will be joined to operators and generators in all Superfund suits. The question of quality will again be subject to the uncertainty of risk beyond professional judgement.

As we stated earlier, the other significant influence on quality assurance is selection of engineers based on qualifications. While this might be considered an administrative or non-programmatic, non-policy issue we are convinced that because Superfund clean-ups are so critical to the protection of the environment and public health, that the system by which technical professionals are chosen must clearly emphasize qualifications and experience.

Dating from the late 19th century, federal policy has been to encourage federal agencies to select design professionals, including consulting engineers and surveyors, on the basis of qualifications. In 1972, this policy was formalized through enactment of P.L. 92-582 (40 U.S.C. 541 et seq.), known more commonly as the Brooks Law (after its principal author, Congressman Jack Brooks). Briefly, the Brooks Law mandates that all federal agency requirements for engineering, surveying and other design professional services be publicly announced and fully and openly competed on the basis of qualifications.

Specifically, the process involves submission of technical qualifications and capabilities by all interested firms, evaluation of responses, development of a "short-list" of qualified firms, discussions with representatives of those firms, and ranking of the firms. Negotiation of a fair and reasonable cost is then begun with the top-ranked firm. If an agreement cannot be reached with the top-ranked firm, negotiations are terminated with that firm, and begun with the second-ranked firm, and so on.

This application to design professional procurement is also included in the Model Procurement Code of the American Bar Association.

The significant advantage to quality assurance in employing this system is that client and engineer can readily come to a clear and complete understanding of scope, specific responsiblities, schedules and related requirements.

For this reason, the Brooks Law approach must be extended to federal engineering subcontractors as well. And while over two dozen states have procurement procedures that are comparable to P.L. 92-582, the requirement that these procedures should be followed for procurement of professional engineering services under state-cooperative agreements should also be extended under the Act.

Finally, quality assurance in the Superfund program requires that full and open competition be the standard for the selection of engineers and contractors. Experience and capability includes many criteria including location, familiarity with the site, and commitment of specific personnel with the requisite skills and experience.

It has come to our attention that under the provisions of the Federal Acquisition Regulation (FAR), as presently drawn, rules concerning small business utilization may dictate that hazardous waste response contracts will be totally set aside for "small" firms. While current small business size standards devised by the Small Business Administration (SBA) would allow such set-aside contracts to be awarded to over 96% of ACEC's member firms, it is important to note that the remaining 4% of "non-small" ACEC members, including the firms that Mr. Henningson and I represent, which have perhaps the greatest depth of hazardous waste response experience, would be unable to compete.

ACEC has long supported full and open competition for design professional services based on qualifications. We strongly believe that the Brooks Law approach will result in selection of a broad range of small, mid-size and large hazardous waste design contractors as "primes," and that significant subcontracting opportunities for small, highly specialized, single-discipline engineering firms will also result.

In any case, the requirement for highest possible quality in the interest of public health, safety and welfare must not be undermined by the absence of full and open competition.

We urge the Committee's favorable consideration of our suggestions concerning quality assurance in its deliberation on the reauthorization of the Superfund program. Both liability exposure and procurement are essential determinants of the availability of the vast technical capacity of the private-sector design professional community, and expeditious yet thoroughgoing progress in hazardous waste cleanup is highly dependent on optimizing that capacity.

Again, Mr. Chairman, we appreciate the opportunity to appear before you today, and we would be pleased to respond to your questions. Thank you.

APPENDICES

1. Suggested Language for Quality Assurance Amendments in Superfund Reauthorization.

2. House Bill 245 North Carolina General Assemble "Strict Liability for Damages Resulting from Hazardous Waste."

3. Summary of A/E Selection by Qualifications: PL 92-582 (Brooks Law).

4. Comparison of Liability Protection Options.

5. Letter to Honorable Robert T. Stafford regarding Contractor Liability from ABA Section on Public Contract Law.

6. Letter to Honorable James J. Florio regarding capacity of private sector engineering community to respond to Superfund.

APPENDIX 1

(c) Section 104 is amended by adding the following new subsection at the end thereof:

"(j)(1) There shall be no liability under section 106 or 107 of this Act for any costs or damages referred to in paragraph (2) on the part of any 'response action contractor' beyond the extent of commercially available insurance or self-insurance coverage approved by the Contracting Officer. For purposes of this subsection a 'response action contractor' is a person who enters into a contract, subcontract or Agreement with--

"(A) the Administrator or his representative;

"(B) a State; or

"(C) any responsible party

to provide any technical assistance, initial or remedial site investigation, feasibility study, evaluation, planning, engineering, design, construction, construction management, equipment or any ancillary services thereto pursuant to any action authorized under this section, including a response action plan approved by the Administrator or by the State. All such contracts, subcontracts and Agreements shall contain provisions to indemnify the contractor, as provided for in this subsection.

"(2) The Government will hold harmless and indemnify the Contractor against claims (including expenses of litigation and settlement) by third parties (including employees of the contractor) for death, personal injury or loss of or damage to property to the extent that such claims are not compensated by insurance or otherwise if such claims arise out of the performance of the contract or result from a release of a hazardous substance or pollutant or contaminant at or near the site concerned to the extent that such release--

"(A) occurred before the date on which a response action contractor or subcontractor commenced technical assistance, remedial response activity or physical onsite work at such site; or

"(B) occurred after such date but was caused by--

"(i) authorized action undertaken by a response action contractor or subcontractor pursuant to this section or in accordance with the specific requirements of a plan for response action (or any amendment thereto) which has been approved for such site by the Administrator or by the State; or

"(ii) any person other than a response action contractor, unless such claims or losses result from gross negligence or willful misconduct of the response action contractor; or

"(iii) any response action contractor who fails to maintain the insurance coverage or reserve required by the Contracting Officer.

"(3)(A) Nothing in this subsection shall provide any exemption from liability under this Act for any person other than a response action contractor or subcontractor referred to in paragraphs (1) and (2) who has secured and maintained commercially available insurance or self-insurance, as required by the Contracting Officer.

"(B) Nothing in this subsection shall exempt any response action contractor from any such liability if the response action contractor would be a responsible party referred to in paragraph (1), (2), (3), or (4) of section 107(a) of this Act.

"(4) Any contractor or subcontractor aggrieved by any decision or determination of the contracting agency with respect to the indemnification for response action contractors, defined in this subsection, may appeal such determination pursuant to sections 7 and 10 of the Contracts Dispute Act of 1978, and any claim for payment of indemnity pursuant to the provisions of this Act shall be filed in accordance with and be subject to the Contracts Dispute Act of 1978 (41 U.S.C. §§ 601 _et_ _seq_.).

"(5) Response action contractors shall be responsible for exercising professional judgment and caution in the performance of contracts under the authority of this section but shall not be responsible for failure to use new, untried technologies which may develop after the work of the response action contractor is completed; in no event shall any site-specific claims be valid against a response action contractor after 10 years, as measured from the date of its last contract invoice for the specific site.

"(6) To protect the health and safety of the public and to assure the selection of technically superior response action contractors to perform contracts, subcontracts and Agreements which are authorized under this section, no potential offeror of a bid or proposal for a contract, subcontract or Agreement to be performed and funded under the authority of this Act shall be denied the opportunity to compete for such contracts. Response action contractors for program management, construction management, architectural, engineering, surveying and mapping and related services shall be selected in accordance with 40 U.S.C. §§ 541 _et_ _seq_. These selection requirements shall apply to all governmental agencies designated in the Act or involved in carrying out this Act under Memoranda of Understanding or other means, and contractors acting on their behalf.

"(7)(A) Notwithstanding the provisions of sections 1341, 1349 through 1351 and 1512 through 1519 of title 31, United States Code the contracting agency or agency signing the Agreement is authorized to make payments pursuant to any indemnification provisions included in contracts pursuant to subsection (j)(1) of this section from (1) funds obligated for the performance of the contract from which the contractor's liability arises; (2) funds which are available to the agency for the same type of contract as the contract from which the contractor's liability arises, and which are not otherwise obligated; (3) funds specifically appropriated for such payments; and (4) funds appropriated pursuant to section 1304 of title 31, United States Code.

"(B) Section 1304 of title 31, United States Code, is amended by inserting ", or Section _____ of the Superfund Improvement Act of 1985" after "or 2677 of title 28".

APPENDIX 2

I CEC

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1985

HOUSE BILL 245

Short Title: Hazardous Waste Strict Liability.. (Public)

Sponsors: Representatives Clark and Hackney..

Referred to: Natural and Economic Resources.

March 18, 1985

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR STRICT LIABILITY FOR DAMAGES RESULTING FROM HAZARDOUS WASTE IN NORTH CAROLINA..

The General Assembly of North Carolina enacts:

Section 1.. Short title. This act may be cited as the Hazardous Waste Strict Liability Act of 1985..

Sec.. 2.. Purpose.. The purpose of this act is to provide for a workable strict liability system for hazardous waste injuries occurring in North Carolina as recommended in the 1983 Report of the Governor's Waste Management Board..

Sec.. 3.. Creation of a strict liability system for hazardous waste injuries.. Chapter 130A of the General Statutes is amended in the following manner:

(1) By amending G.S.. 130A-290 so that the following definitions shall apply throughout Article 9 of Chapter 130A:

"(1) 'Caused by' means caused in fact.. If the evidence offered by any party tends to show that the damage of which the claimant complains was caused by both a hazardous waste occurrence and other causes, liability under G.S.. 130A-307 shall be limited to damages attributable to the hazardous waste occurrence.

(1a) 'Claimant' means a person damaged by a hazardous waste occurrence.

(1b) 'Comprehensive hazardous waste treatment facility' means a facility designated as such by the Governor's Waste Management Board, meeting the following criteria:

a. It is a commercial facility that accepts accepts hazardous waste from the general public for treatment;

b. It has the capacity and capability to treat and dispose of hazardous waste on at least an intrastate regional basis; and

c. Its location will substantially facilitate treatment of hazardous waste for the State of North Carolina.

(1c) 'Disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land so that the solid waste or any constituent part of the solid waste may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(7b) 'Hazardous waste management' means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.

(8) 'Hazardous waste occurrence' means any sudden or nonsudden occurrence in which damages result from any quality or characteristic of a solid waste, as defined in G.S. 130A-290(18), which quality or characteristic causes the waste to be a

hazardous waste under this Article and the rules and regulations adopted pursuant to it.

(23a) 'Strictly liable' means liable without regard to the defendant's negligence or fault. The defendant's foreseeability of danger or risk arising from or injury or other consequences caused by a hazardous quality or characteristic of the waste either at or prior to the occurrence shall not be relevant to a determination of liability..

(2) By adding a new section G.S..130A-307 to read:

"§ 130A-307.. Hazardous waste liability.--(a) This section applies only to hazardous waste occurrences caused wholly or partially by a defendant's operations or activities occurring after the effective date of this act.. This section does not apply to any hazardous waste occurrence caused wholly or partially by hazardous waste generated prior to the effective date of this act.. This act does not prevent a claimant from pursuing any cause of action that existed under statutory or common law prior to the effective date of this act.. For the purpose of this section, waste polychlorinated biphenyls shall be considered a hazardous waste.. Furthermore, for the purposes of this section, governmental immunity from strict liability for personal injury or property damage caused by a hazardous waste occurrence is hereby waived, but only to the extent that damages do not exceed the amount of damages authorized by the North Carolina Tort Claims Act, G.S..143-291.. Any agency of the State of North Carolina that generates, transports, treats, stores, or disposes of hazardous waste is hereby authorized and empowered to procure proper insurance against such liability..

(b)

(1) Subject only to the defenses set forth in subsections (c) and (e) of this section, the generator, transporter, treater, storer, or disposer in control of a hazardous waste at the time of a hazardous waste occurrence shall be strictly liable for personal injury or property damage caused by the occurrence..

(2) Subject only to the defenses set forth in subsections (c) and (e) of this section, the generator of a hazardous waste, whether or not in control of the hazardous waste at the time of an occurrence, shall be strictly liable for personal injury or property damage caused by hazardous waste occurrences arising from the hazardous waste generated.. Under this subdivision, the generator shall be jointly and severally liable together with the transporter or any other person in control of the hazardous waste at the time of the occurrence.. For purposes of this subsection, any person that accepts a hazardous waste from a transporter for storage and causes the hazardous waste to be again transported shall be considered a generator..

(c) There shall be no liability under subsection (b) for a person otherwise liable who can establish by a preponderance of the evidence:

(1) that the claimant had knowledge of the danger and voluntarily and unreasonably encountered that danger; or

(2) that the hazardous waste occurrence was caused solely by any one of the following:

a.. an act of God;

b.. an act of war or sabotage; or

c.. an intentional act or omission of a third party (but this defense shall not be available if the act or omission is that of an employee or agent of the defendant, or if the act or omission occurs in connection with a contractual relationship with the defendant)..

(d) Nothing in this section shall bar or otherwise affect the transfer of liability to the Post Closure Liability Fund, under Section 232 of the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980..

(e)

(1) Subject to the provisions of subsection (g), any defendant who proves that hazardous waste was transferred to and accepted by a hazardous waste facility duly permitted by appropriate regulatory agencies of which he is not the beneficial owner or operator and that such transfer and acceptance is in compliance with applicable federal and State requirements existing at the time of the transfer and acceptance shall not be liable under subsection (b) for bodily injury or property damage caused by

a hazardous waste occurrence after such transfer and acceptance..

(2) When signatures are admitted and established, production of a copy of a hazardous waste manifest entitles a defendant, who according to the manifest generated or transported the waste to a hazardous waste facility, to the defense under this subsection unless the claimant establishes that the waste was not in fact transferred to and accepted by the hazardous waste facility prior to the hazardous waste occurrence..

(3) Each signature on a hazardous waste manifest is presumed to be genuine or authorized unless the party opposing its admission offers prima facie evidence that it is not genuine or authorized..

(f) No punitive or exemplary damages shall be awarded in any action under subsection (b)..

(g) Nothing in this section shall deprive a claimant from electing to pursue any other cause of action based upon a hazardous waste occurrence that may exist under statutory or common law, or to deprive a person liable under subsection (b) of any right of contribution under the Uniform Contribution Among Tort-Feasors Act, Chapter 1B of the General Statutes, or indemnity he may have under law in existence at the time of the occurrence, nor shall anything in this section restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement or to seek the imposition by any State and federal authorities of civil and criminal sanctions. If the principal action was decided on the basis of strict liability, the principles of strict liability shall also apply in any action for contribution or indemnification arising out of the same hazardous waste occurrence.

(h) If any provision of this section or its application to any person or circumstances is held invalid by any court of competent jurisdiction, the invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application; and to this end the provisions of this act are severable."

Sec. 4. G.S. 1-52(16) is amended by changing the second sentence to read as follows:

"Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action; except that for any cause of action arising out of a hazardous waste occurrence as defined in G.S. 130A-291(8) no cause of action based on strict liability under G.S. 130A-307 shall accrue more than 30 years from the last act or omission of the defendant giving rise to the cause of action."

Sec. 5. This act shall become effective October 1, 1985.

APPENDIX 3

Summary of A/E Selection by Qualifications: PL 92-582 (Brooks Law)

The Act itself explains the basic process. The Act, enacted in October, 1972 requires:

- public announcement of prospective opportunities inviting all interested professionals to apply;
- submission of professional qualifications by interested firms;
- discussions with three or more firms regarding their approach to the project;
- selection, in order of preference, of no less than three firms deemed to be most highly qualified; and
- negotiation with the highest ranked firm to arrive at a contract price the agency head determines to be fair and reasonable to the government. If an agreement cannot be reached with this firm, negotiations are terminated. Thereafter, negotiaitons are begun with the second ranked firm and so on until a contract is consummated.

In codifying this A-E selection procedure, Congress was concerned with three principal issues:

- That the selection process be open, through announcement of all A-E contracting opportunities, so that all interested firms be given a chance to compete;
- that selection should be on the basis of qualification, since the design of a typical public works project, which represents roughly 2 percent of the total life cycle (construction, operation and maintenance) cost of the project, controls the life cycle cost; and
- that the compensation of the architect-engineer be fair and reasonable to the government.

The Brooks Act: Why Not Price?

The issue that most frequently arises in discussion of the Brooks Law can be put in the form of a simple question---why aren't architect-engineering services procured on the basis of price, as is virtually every other type of good or service procured by the government? This question was answered by the House Government Operations Committee, which drafted the law:

> Under this system, A-Es are under not compunction to compromise the quality of the design or the level of effort they will contribute to it in order to meet the lower "fee" quotations of other A-Es. They are free to suggest optimum design approaches that may cost more to design, but can save in constructioon costs and otherwise increase the quality of the building or facility to be constructed.
>
> This system protects the interest of the taxpayers. Having won the competition on the basis of capability, the winning A/E must then negotiate his fee. He must demonstrate on the basis of project costs that his fee is fair and resonable. He must accept whatever adjustments the Government demands if he wishes to obtain the contract. He knows that if he holds out for an unfair or unreasonable fee, the Government will terminiate the negotiations and award the contract to another A-E at a fair and reasonable price." (H. Rept. 92-1188, June 25, 1972.)

This view is shared by design professionals responsible for the execution of efficient, cost-effective planning and design activities within federal construction agencies. One such official, Rear Admiral D.C. Iselin, then Commander, Naval Facilities Engineering Command, said in March, 1978:

> In buying architect-engineer services, we are not buying a predetermined product, as when we have our construction plans and specifications--then we have predetermined exactly what we are going to buy.

APPENDIX 4

LIABILITY PROTECTION OPTIONS

Under existing law conscientious, competent engineering and construction contractors are discouraged from participation in the Superfund program because of the potential for being held jointly and severally liable for injury or property damage. Contractors with specialized engineering, design and scientific expertise so vital to the management of Superfund now find themselves understandably reluctant to participate in the development of successful, site-specific responses, including investigative, remedial and removal actions.

To facilitate and expedite effective clean-up work under the Superfund program and to assure performance by highly qualified contractors, Congress must make the policy decision to select those contractors based on qualifications and to protect from liability those contractors who work with EPA, the states, and private parties to perform the site analysis, evaluation and clean-up work. These engineering and construction firms, known as response action contractors, range from those that initially perform engineering feasibility studies through those that develop and design appropriate remedial or removal solutions and those that perform actual construction work.

To assure the continued growth and expansion of technological approaches now being developed through the combined efforts and experiences of Federal and state agencies and several highly specialized, private contractors and professionals in many related fields, meaningful protection from statutory liability must be offered to response action contractors. This is not to say that response action contractors are to be absolved of compliance with traditional standards of care. They should be accountable for their own negligent acts.

Once the Congress makes a threshold decision that this group of response action contractors should be protected, the next logical question is how this protection can be structured to best serve the public interest. Several options have been suggested to the Congress. Among the options three appear most promising: exclusion, insurance and indemnification. Each has its strengths and weaknesses. However Congress ultimately decides to address this response action contractor problem, it is important to enact legislation quickly. Expeditious action will benefit the Superfund program and assure maximum opportunities for clean-up work across the country.

For the sake of brevity the advantages and disadvantages of each of three main options are outlined below.

EXCLUSION

Advantages

- Provides total exemption from liability under federal Superfund statutes for response action contractors.
- Creates Federal standard of care for Superfund liability issues to override substantive tort law in 50 states.

- Permits protection to apply irrespective of contractual terms.

Disadvantages

- Fails to provide any mechanism for risk allocation between contractors and the government.
- Eliminates clear definition of coverage. Not clear whether state cooperative and private agreements would also be covered.
- Ignores need to identify standard of negligence and invites recourse to the common law.

INSURANCE

Advantages

- Encourages contractors to develop private self-insurance scheme. Create environment for favorable issuance of reinsurance. At the present time, carriers are asserting that they cannot issue policies since there is no base period of actual experience against which to make these judgments. Contractors know their own track record.
- Creates potential statutory insurance entity, "toxi-mae." Modeled after the successful insurance vehicle of the

housing market, "Fannie Mae."

Disadvantages

- Actual dollar cost of setting up independent entity would likely be very high. Insurance option would need to be reviewed by several congressional committees. No clear indication of interest in secondary reinsurance market.
- Avoids issue of standard negligence. Insurance would substitute for responsibility requirement for response action contractors.

INDEMNIFICATION

Advantages

- Allocates risks between government and the response action contractors based on reasonable level of available insurance. The allocation of risk provides for a fair and equitable sharing of liability in the interest of getting the best qualified contractors to participate in the Superfund program.
- Defines scope of the activities and extends indemnification to all elements of Superfund program, including Federal, state and certain private clean-up actions.
- Permits contractors to rely on meaningful indemnification because of mandatory provision.

- Allows for identification of mechanism to resolve claims. One possibility is to include a role for the contracting officer or his representative in providing resolution of contract indemnification claims through the Contracts Disputes Act.

- Recognizes need for response action contractors to be responsible for own actions performed under contract or agreement. Standard of care to which contractors are held is the traditional community standard for the profession.

- Ties eligibility for indemnification to adequate insurance coverage. Insurance companies would be more amenable to writing policies since the exposure of the contractor would be significantly limited and quantifiable.

- Utilizes contract terms to meet any unique site problems or indemnification.

- Identifies funding source for mandatory payments. It is possible that three sources could be used -- Superfund itself, supplemental appropriations, or the judgment fund under the Contracts Disputes Act. If the judgment fund is used, EPA would be required subsequently to repay the fund.

Disadvantages

- Requires Federal contribution of funds in the event of a catastrophe.
- Leaves open possibility that injured parties may try to impose standards of liability under state law which may undermine Federal indemnification efforts.

APPENDIX 5

American Bar Association

WRITER S ADDRESS AND TELEPHONE

March 28, 1985

The Honorable Robert T. Stafford
Chairman
Committee on Environment and
Public Works
United States Senate
Washington, D.C. 20510

Re: Contractor Liability Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980

Dear Mr. Chairman:

This letter is written on behalf on the Section of Public Contract Law of the American Bar Association. These views have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the ABA.

Our Section consists of attorneys in Government and private practice at Federal, State and municipal levels who by virtue of the diversity of their employment and clients, reflect a broad range of views. The Section is seriously concerned with the potential liability of engineering and construction contractors conducting remedial or removal actions on behalf of the United States Environmental Protection Agency, or their delegee, the Corps of Engineers, or directly with the States acting under cooperative agreements for EPA. Potential liabilities for these contractors arise not only out of the common law theories of negligence, but additionally arise by virtue of the various statutory provisions found in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

It is believed that the availability of effective contractor indemnification and insurance will greatly facilitate the carrying out of the important national interest and objectives called for by CERCLA and that without such availability, responsible contractors will

1984-85

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SECTION OF PUBLIC CONTRACT LAW

not be able to provide the necessary services and functions essential to the achievement of the Act's purposes. The Section has adopted the following resolution:

> BE IT RESOLVED THAT:
>
> The Section of Public Contract Law of the American Bar Association supports the enactment of provisions in the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA-Superfund), Public Law 96-510 (Expiring September 30, 1985), and appropriate regulations, policy and contract clauses that would provide for effective contractor indemnification and insurance from liabilities arising out of contractual performance of services and functions necessary for removals, responses and remedial actions to control or clean up hazardous wastes, pollutants or contaminants as authorized or required by CERCLA.

By adopting the above resolution the Section of Public Contract Law does not take a position on the question of what parties, if any, may be liable for any sums indemnified, nor is the Section suggesting what determination be made as to ultimate liability or the defenses which can be asserted by or against any responsible party.

We understand that your Committee will conduct hearings on Superfund legislation next week. The Section on Public Contract Law would very much appreciate the opportunity to present it views concerning this problem, the deficiencies of current law, and a range of recommendations which would address those problems.

In addition we would be very pleased to assist the Committee and the United States Environmental Protection Agency in any further way to address this matter and develop a solution.

Very truly yours,

Ruth C. Burg

Ruth C. Burg
Chairperson
Section of Public Contract Law

RCR:ABA:201

cc: The Honorable Lee M. Thomas
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

The Honorable Lloyd Bentsen
Ranking Minority Member
Committee on Environment and
Public Works
United States Senate
Washington, D.C. 20510

APPENDIX 6

American Consulting Engineers Council

1015 Fifteenth Street, N.W., Washington, D.C. 20005
202-347-7474
Telex [illegible] AMCONENGRC WSH

March 7, 1985

Honorable James J. Florio
Chairman
Subcommittee on Commerce,
Transportation and Tourism
Committee on Energy & Commerce
House of Representatives
Washington, D.C. 20515

Dear Chairman Florio:

The American Consulting Engineers Council is pleased to respond to your request concerning the capacity of the private engineering community to perform site assessment and remedial design and other engineering services to implement hazardous waste site clean-ups. In our opinion there is adequate capacity within the industry to respond to both public and private demand for engineering services. Moreover, the industry has the capacity to expand that capacity by appropriate management of resources, if the program at the federal and state level is properly directed to utilizing technical resources for actual clean-up related activities. Capacity is only an issue where resources are consumed by non-engineering requirements of the program or where management and policy constraints impact resource availability.

We have identified within the limited time since receiving your request more than 300 firms who have the direct or related experience and capability to perform one or more of the critical skills necessary for assessment, design and other services. These firms employee more than 27,000 engineering, scientific, technical and support personnel. This is more than twice the civil engineering capacity of the civilian sector of the entire federal government. Because of the multiple discipline nature of this work a substantial percentage of these firms are large national firms who have branch offices in many states. We have further categorized the firms by experience which directly contributes to "Superfund" practice - hazardous waste management, industrial waste treatment, groundwater movement (hydrogeology), industrial hygiene and laboratory services.

We have, in addition, identified firms who have general civil and environmental engineering experience in solid waste management. These firms, while not indicating the more specialized hazardous or industrial waste experience, draw their knowledge

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Tennessee *President-Elect* ARNOLD L. WINDMAN, New York, New York *Executive Vice President* LARRY N. SPILLER

from two major activities. The one is the management of municipal waste through collection transfer and disposal, primarily through landfilling. The other is the energy and materials separation and recovery from municipal waste and the design of boilers and incinerators. These constitute a base of firms with related experience who when teamed with firms with a hazardous waste clean-up track record will provide a means of transfer and expansion of hazardous waste management, technology, to meet the needs of an expanded program.

The raw numbers of available of firms and skills, however, does not convey a qualitative measure of the industry's capacity. Geographic distribution is also significant because familiarity with local conditions physically, economically and institutionally will provide advantages to solving complex Superfund clean-ups. The distribution and concentration of engineering firms with industrial and hazardous waste management experience matches the concentration of sites in the NPL. The greatest resource concentrations of experienced firms based on our quick review of identified skills matches the concentration of NPL sites in California, Colorado, Florida, Michigan, Missouri, New Jersey, New York, Texas and Washington. (See attached chart).

The capacity of the engineering community to respond to the demand and growth of the Superfund program, however, is constrained by factors which are not resource-specific. These factors are primarily institutional and managerial. They are also inherent in the law, which has to this point focused effort on the identification of responsibility for disposal of hazardous wastes and the apportionment of liability to provide restitution to the funds, rather than the crafting of solutions and the application of technology to site clean-ups. We will briefly comment on these constraints. We feel that these constraints define the availability of resources, rather than the raw numbers of firms and skills. The removal of these constraints, thereby, increases availability or effective capacity of the engineering community to respond.

Engineering Responsibility

Attainment of the objectives of the Superfund program are critically dependent on the quality of site assessments, design and other engineering services. The complexity of options for treatment at these sites and the potential for harm to public health from release of chemicals off the site, as well as to the employees of engineering firms, construction companies and others involved, require that engineering firms be free to exercize their best professional judgment. The quality of that judgement and indeed the very existence of the firm are jeopardized by the potential for claims and lawsuits by third parties. The Superfund defines a strict liability standard for responsible parties. If engineering firms are to do their best work they must be distinguished from responsible parties and be liable only for their own negligence.

Firms must also be protected from technological second-guessing. The applied technology of engineering requires that the most effective technology, both as to results and cost, be chosen at a given point in time. The use of untried technologies which may appear effective in the abstract, but in reality have been tested by proper demonstration and field evaluation are not in the public's best interest. Therefore, the engineer should not be held liable for not using an untried, or even an unknown, technology in cleaning up a site, at a point years later when such technology has been tested and accepted.

Program Management

Federal and state management can also be a constraint on engineering capacity. There is, particularly at the state level, a shortage of experienced program managers to oversee and make the critical decisions regarding clean up strategies, costs and disposal alternatives. These decisions are not the engineer's to make. The engineer's role is to evaluate and recommend strategies and then design the technologies chosen by federal and state regulatory officials. The effectiveness and efficiency of the decision management process is a critical part of the speed and progress of the Superfund program. As the states play a larger role under state cooperative agreements it will become more critical.

A parallel can be drawn from the EPA Wastewater Treatment Construction Grants program in the early 1970s. The progress of that program was bottlenecked in the decision making of the facility planning process. Many projects languished for years while facility plans were analyzed and redone, some many times. Since the planning, assessment and conceptual design activities are critical steps in the Superfund process, it is incumbent that the management of these decisions be given management priority if the program is to move forward and resources effectively used.

Selection and Procurement

The liability exposure and program management concerns raised above are conditioned by the procurement practices employed by EPA, the states, and major contractors. Liability exposure is mitigated when Superfund engineering and construction contractors are selected under procurement procedures that afford full and open competition and emphasize highest quality and fair and reasonable costs; under such conditions, ambiguities in scope of work and ultimately in construction specifications, can be minimized, through dialogue by and between designer, contractor and client. Program management is effectively improved, as all parties can more fully and clearly understand specific responsibilities, schedules and related requirements. In the selection of engineers, the use of procurement procedures included in P.L. 92-582 (40 U.S.C. 541 et seq.) is critical. Under these procedures, firms are first invited to submit technical qualifications and proposals; then, a "short list" of the most highly-qualified firms is developed and ranked; after completion of the ranking based on qualifications, negotiations are begun with the top-ranked firm, with the objective of achieving fair and reasonable costs.

This approach must be extended to federal engineering subcontractors as well. And while over two dozen states have procurement procedures that are comparable to P.L. 92-582, the requirement that these procedures should be followed for procurement of professional engineering services under state-cooperative agreements should also be extended under the Act.

Pricing and Cost Evaluation

Engineering firms have experienced pricing limitations in the negotiation of Superfund contracts, which limit quality and may affect availability. An example is the limitation on overhead imposed by the state of New York to 115% of direct labor. New York established a central procurement office for services using an overhead rate limit developed for highway design services. Because Superfund projects are of much higher risk, the cost of liability insurance alone pushed overhead well beyond the limit.

Another example relates to laboratory services. The state of Minnesota certified a number of in-state labs qualified to do analyses for Superfund samples. The EPA Region, we understand, reviewing the certification, however, discouraged the use of the labs because the cost per-sample was higher than the contracts EPA had with several large national laboratories. The lab pricing policy also tends to slow down the response time of Superfund analyses. The laboratories respond to private clients who pay higher sample prices first. Superfund samples are not top priority in workload. As a result of this situation, engineers have experienced delays waiting for sample results.

In conclusion, the experience of ACEC members on hazardous waste clean-ups is available to respond to federal, state and private programs. We believe the capacity of the industry to be more than adequate and it will grow based on the teaming of firms that occurs on these projects. In addition, the experience of firms with related skills is available as the constraints are removed and the practice of hazardous waste management becomes more certain.

We would be pleased to respond to any questions about this statement or the data supplied. We are also available to present testimony or brief members of the Sub-committee at any time during the reauthorization process.

Sincerely yours,

William J. Birkhofer
Managing Director
Governmental and
International Services

CH2M HILL
Engineers
Planners
Economists
Scientists

APR 25 1985

April 19, 1985

The Honorable Steve Symms
United States Senate
SH-509 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Symms:

One behalf of the American Consulting Engineers Council and other small design professionals interested in Superfund, I want to thank you and other members of the Environment and Public Works Committee for their interest in our situation. I am pleased to respond to your written questions as follows:

Question 1.

"Your statement mentions 'the standard of care for engineers,' and you say that the engineer has always been responsible for his 'errors and omissions' and liable for 'negligence.' Is it correct to conclude that the engineering profession is not seeking to avoid its responsibilities but is asking for a 'sharing of risk' in order to operate under its normal risks?"

You're correct. The engineering profession is not seeking to avoid any responsibility for its own actions. Prudent and responsible companies have carried professional liabiity insurance in order to deal with any unforeseen errors and omissions on our part. The complexities of Superfund clean-up activities, limitations on available technology, and the risk of being potential "deep-pockets" for any who wish to sue are of great concern to responsible companies who are or would like to assist in cleaning up our nation's hazardous waste problems. We ask that Congress limit our liability exposure to our normal standard of negligence. In response to your oral question, I indicated that our profession is willing to meet this standard IF we can obtain adequate insurance coverage to do so. On the other hand, if responsible companies cannot obtain sufficient coverage to meet this normal negligence standard, they may have to walk away from this important work unless Congress limits our liability exposure.

Question 2.

"We've heard it said that liability implications may cause the most qualified companies to not become involved in Superfund clean-up actions. How real is this contention? Won't there always be someone willing to take these jobs?"

Few engineering companies are involved solely in the hazardous waste clean-up business. This program is clearly one where "second best" is not good enough. If the most competent and qualified companies--and this is a highly specialized area--are unable or unwilling to perform this work, Congress should be concerned about the qualifications of those who would. In our industry, it is an axiom that someone will always take a job at any price or under any conditions. Given the public health and safety concerns as well as technical complexities of hazardous waste clean-ups, having just anybody performing these important tasks should be of great concern to the Congress.

Question 3.

"Why do small business set-asides interfere with quality selection of engineers?"

A well-intentioned but misguided small business set aside policy can adversely impact Superfund design and construction activities by preventing some of the most qualified companies from competing for these projects. This problem appears to be manifesting itself not with EPA's contracting policies, but with those involving the Corps of Engineers. Under the Memorandum of Understanding between EPA and the Corps, the latter agency has site-specific responsibilities for contracting for the design and construction contractors will complete the activities begun under EPA's direction. Contracting representatives of the Corps have indicated that under provisions of the Federal Acquisition Regulations, rules concerning small business utilization may dictate that hazardous waste response contracts be totally set-aside for "small" firms. Since the bulk of our nation's limited qualified hazardous waste design companies are among the approximately 300 firms considered "large" out of an industry of approximately 30,000, insistence on arbitrary set-asides could severely harm the country's clean-up efforts.

Question 4

"The ACEC proposal would require use of the Brooks' Law for subcontracting as well as for prime contracts. Why is this desirable?"

Since much of the site-specific engineering work will be done by those who subcontract to EPA's Zone Management Contractors, who are selected on the basis of qualification-based Brooks' Law, it only makes sense that subcontracts be similarly selected. The Brooks' Law, enacted in 1972, does not address the matter of subcontracting directly. Use of the Brooks' Law should also be required or project awarded under State Cooperative Agreements where the 19 states which do not have mini-Brooks' Laws.

d.101/2

On behalf of the entire Engineer/Architect industry, I urge that the "quality assurance" amendments described in my testimony be included in S. 51 when it is considered on the floor by the entire Senate. I have attached our latest views on the "Contractor Indemnification Amendment". Representatives of the American Consulting Engineers Council and other professional design societies stand ready to work with you and the Committee on this most important matter.

Sincerely yours,

James W Poirot

James W. Poirot
Chairman of the Board
(On behalf of the American
Consulting Engineers Council)

d.101/3

CONTRACTOR INDEMNIFICATION AMENDMENT

On page 88, in Section 124, delete lines 1 to 8 and insert the following new paragraph (2):

"(2) The Administrator shall in contracting or arranging for response action to be undertaken under this Act, agree to hold harmless, defend and indemnify a contracting party against all liability claims (including the expenses of litigation or settlement, arising out of performance by a response action contractor) to the extent that such liability claims do not arise out of the willful misconduct or bad faith of the contracting party as finally determined by a court of competent jurisdiction, and are not compensated by insurance or otherwise.

"(a) the Administrator shall establish minimum acceptable types and limits of insurance coverage -- including professional liability insurance for any response action contractor who enters into a contract, subcontract or agreement with the Administrator, his delegee, a State, or any other person. For the purpose of this section a 'response action contractor' is a party who contracts or agrees to provide technical assistance, initial or remedial site investigation, feasibility study, evaluation, planning, engineering, design, or construction, construction management, equipment, removal or any ancillary or sustaining services pursuant to the National Contingency Plan or a remedial or response action plan approved by the Administrator or a state;

"(b) any disputes concerning the indemnification provided herein shall be subject to and resolved under Sections 601 - 613 of Title 41 of the United States Code, shall be commenced no later than six years after the date of completion of the contract, subcontract or agreement by the response action contractor; and, notwithstanding the provisions of Sections 1301 or 1341 of Title 31 of the United States Code, payments made hereunder shall be reimbursed from the Hazardous Substance Response Trust Fund established by this Act, provided however, that a reserve which shall not exceed in any fiscal year five percent of that Fund shall be set-aside for such reimbursements;

"(c) To protect the health and safety of the public and to assure the selection of technically superior response action contractors, no potential offeror of a bid or proposal for a contract, subcontract or cooperative agreement to be performed and funded under the authority of this Act shall be denied the opportunity to compete for such contracts. Response action contractors and subcontractors for program management, construction management, architectural, engineering, surveying and mapping and related services shall be selected in accordance with 40 U.S.C. SS 541 *et seq*. These federal selection procedures or equivalent state requirements shall apply to appropriate contracts negotiated by all governmental agencies designated in this Act or involved in carrying out this Act under Memoranda of Understanding, state cooperative agreements, or other means, and shall be followed by response action contractors and their subcontractors.

Questions for Mr. Genecki

1. I understand specialized insurance policies for engineers are written on a "claims made basis". Please explain that term, and tell the committee the implications of "claims made" policies for engineering companis, the public, and the insurance carriers.

2. No one can quarrel with the need to employ the most competent professionals and firms to assist in the Superfund cleanup. If we by law assure that all companies can compete for contracts and require use of the Brooks' Law for A-E selections, how would this be received by your company and other providers of engineering insurance coverage?

3. What changes in the law, if any, are needed in order to assure Superfund contractors the availability of insurance for risks that they appropriately should bear?

Victor O.
Schinnerer
& Company, Inc.
5028 Wisconsin Ave., N.W., Washington, D.C. 20016 • Phone 202/686-2850 • Telex 892340

Paul L. Genecki
Senior Vice President

APR 26 1985

April 23, 1985

The Honorable Steve Symms
United States Senate
Committe on Environment and Public Works
Washington, DC 20510

Re: Superfund 1985 Reauthorization

Dear Senator Symms:

Thank you for your letter of April 12 which arrived during my unexpected absence from the office and I now hasten to reply. I will respond to your questions in the order in which you presented them:

1. Professional liability insurance policies for engineers and architects are written on a "claims made" basis. This is the case, today, and policies have been written only on a claims made basis in the United States for more than 28 years. Volumes have been written on the distinction between claims made and occurence basis policies. However, reduced to its simplest terms, a claims made insurance policy means that there must be insurance in force when claim is first made against the insured. There are, of course, "variations on a theme" and, for example, some claims made types of professional liability policies require that there must have been insurance coverage when the alleged negligent act, error, or omission occurred as well as when claim was first made against the insured.

   The implications of the claims made policies can be numerous and complex. Again, reducing matters to the simplest terms, the implications for engineers (and engineering companies) is that they must maintain professional liability insurance in force in order for there to be insurance coverage when claim ultimately is made against them. Under some forms of claims made policies, there also is an opportunity for the insured to purchase "discovery coverage" which would extend coverage for services performed in the past in the event that claim is made at some point in the future. "Discovery coverage" is not universally available to the design professional.

For the public, the primary implication of claims made insurance policies is that if the entity against which claim is being made has not maintained insurance in force, there would be no insurance coverage for the claim and the claimant would have to rely on the assets of the engineer to respond if there were to be any recovery.

For insurance carriers, the primary implication of claims made policies is that there is a reasonable degree of accuracy in actuarial forecasting and rate setting methodology (premium determination). This is so, owing to the fact that the actuaries have to project claims frequency and claims severity only for the one year period of coverage under the policy, rather than attempting to determine a premium necessary to cover claims which might be made at some unspecified date far into the future.

As stated above, there are other ramifications and we would be pleased to expand on our response or to answer any specific questions that you, other Committee members, or your staff might have.

2. If future Superfund legislation were to require use of "Brooks law" provisions for selection of design professionals, it would be received very well by us and, I would predict, by other providers of professional liability insurance for engineers. Over the term of our 28 years' experience as underwriting managers of a national professional liability insurance program for engineers and architects, we have gathered a wealth of statistics on claims against design professionals. However, it is impossible to prove with empirical evidence that competititve bidding for professional services increases the frequency and severity of professional liability claims against engineers and architects. This is because, in the majority of professional liability claims, we have not been able to determine whether or not competitive bidding based on fees was involved in the selection of the engineer or architect. Nonetheless, though we lack the statistical data, we remain firmly convinced that competative bidding, based on fees, for design professional services is totally inappropriate and that selection of engineers and architects on the basis of fees or projected fees is ill-advised and is more likely to result in increases in claim frequency and severity.

Frankly, I have never been able to understand the rationale behind proposals that call for the awarding of contracts to design professionals based on fees. I cannot imagine that anyone, even the proponents of competitive bidding for engineers and architects, would select a doctor to perform needed surgery on the basis of fee bids!

3. Unfortunately, there are no changes in the law that we can recommend that would absolutely assure the availability of professional liability insurance for engineers, and others, performing services contemplated under Superfund legislation. However, there are a few changes that could be made that, in our opinion, would greatly increase the probability that coverage would remain available to design professionals. I would characterize these changes, as I did in my statement for the record submitted on April 11, 1985 as being within the spirit of what has become known as the "Edgar Amendment" to the 1984 Superfund legislation.

In our opinion, equity demands that engineers who are called upon to help solve an existing problem, in this case, hazardous waste abatement, a problem which they neither created nor contributed to in any way, should not be exposed to liability expanded beyond that of traditional negligence standards. It seems clear to us that any legislation needs clearly to distinguish between those entities which created or contributed to the hazard and those entities which are needed to solve a problem created by others.

As I remarked in my earlier statement, we would predict that the insurance industry will not be able to cope with the uncertainty of underwriting results occasioned by liability that would be vastly expanded under theories of strict, joint, and several liability. If design professionals' liability is to be determined under such theories, professional liability insurance will no longer be available to these professionals, at any price.

In summary, we believe that the spirit and intent of the "Edgar Amendment" is appropriate, but we also believe that additional language is necessary to make clear that the protection afforded to "response action contractors" is available to those entitites during the period in which initial services are being provided and before a plan has been approved. It seems to us extremely important, because of the demonstrated history of judicial interpretation, that the Congress make explicit that it is not the intent of any legislation to expand, in any way, traditional concepts of negligence.

We appreciate this opportunity to answer your questions and to present our views on the proposed legislation. We remain willing to meet with you or your staff, at your convenience, to further discuss any aspect of my earlier statement, my responses above, or any topic related to professional liabililty insurance for design professionals.

Very truly yours,

Paul L. Genecki

Paul L. Genecki

PLG:sgh

Testimony of

Byron Farrell

for

The Associated General Contractors of America

Presented to the

Committee on Environment and Public Works

United States Senate

on the Topic of

Contractor Liability on Superfund Cleanup Projects

April 3, 1985

AGC is:

* More than 32,000 firms including 8,400 of America's leading general contracting firms responsible for the employment of 3,400,000-plus employees;
* 110 chapters nationwide;
* More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utilities facilities;
* Over $100 billion of construction volume annually.

The Associated General Contractors of America and its 110 chapters nationwide represents more than 32,000 firms, including 8,400 of America's leading general contracting companies which are responsible for the employment of more than 3,400,000 individuals. These member contractors perform more than 80 percent of America's contract construction of commercial buildings, highways, industrial and municipal-utilities facilities. AGC is pleased to be given the opportunity to present its views on S. 51 to reauthorize the federal hazardous waste cleanup program known as Superfund. AGC supports the efforts of the Federal government to fund a hazardous waste cleanup program and to extend the existing Superfund program for five more years at an increased level. AGC is pleased to see that the Committee has recognized one of the primary obstacles to increased competition for cleanup contracts and supports the thrust of the provision in S. 51 to indemnify contractors against third party liability which is not caused by contractor negligence.

By originally enacting Superfumd legislation and by now indicating the intent to reauthorize the program, Congress has demonstrated its deep concern for the health and safety of our citizens which is threatened by abandoned chemical waste dumps. The overriding concern of the program is to ensure that these chemical dumps are cleaned up in as safe and as expeditious a fashion as is possible. It is paramount that in cleaning up these sites no additional safety or health problems be created for the surrounding communities and that the cleanup workers are protected from safety and health hazards that are inherent in these projects. Another consideration in effecting these cleanups is to ensure that the work is performed as economically as possible. Safety and economy are not competing goals but in fact complement one another. A prime method of ensuring that the goals of safety and economy are achieved is to encourage as many qualified contractors as possible to become actively involved in the program. This will create the intense competition that will result in the lowest possible cost.

That intense competition, unfortunately, has not yet been realized. Although the hazardous waste cleanup program has the potential for being a promising market, the associated liabilities and risks are so extreme that many contractors are unwilling to enter the market.

The single largest risk emanates from the potential for third party liability claims. That is, claims by those persons who are not a party to the contract - citizens who live in a community surrounding a dump site who may someday develop health problems related to the site. Construction contractors who are considering entering the hazardous waste cleanup market have great concern that they may be placed in the position of being the only identifiable party connected with a hazardous waste site and that, consequently, they may be held responsible for damage to health resulting from the hazardous waste site.

The risk of third party liability is compounded because contractors are unable to obtain adequate insurance coverage for the risk. Generally, a contractor's Comprehensive General Liability (CGL) insurance policy covers third party liability claims. However, because of the dramatically escalating losses suffered by insurance companies as a result of "pollution" claims, CGL policies have been amended to exclude coverage for the long-term gradual release of pollution. Recently, many insurance policies have begun to also exclude coverage for sudden and accidental pollution. To insure these types of liabilities, insurance companies have developed a separate type of policy called Environmental Impairment Liability Insurance (EIL). Insurance underwriters. however, are not offering this type of coverage for cleanup contractors at Superfund sites.

Even if underwriters were willing to write this coverage for cleanup contractors, however, the policies currently being offered are totally inadequate. Currently EIL coverage is offered only on a "claims made basis". This means that the policy only covers claims that are filed while the policy is in effect. A contractor, consequently, must keep the coverage indefinitely to cover the risks since most problems that are likely to develop as a result of cleaning up a hazardous waste site are not likely to show up immediately but rather over an extended period of time. The contractor can never be sure that he is free of liability claims from a cleanup project and is always faced with the threat of the insurance company refusing to continue to provide coverage.

AGC commends this Committee for recognizing this liability problem in S. 51. The Committee's proposal provides that:

"The Administrator may, in contracting or arranging for response action to be undertaken under this Act, agree to hold harmless and indemnify a contracting party against claims, including litigation or settlement, by third persons for death, bodily injury or loss of or damage to property arising out of performance of a cleanup agreement to the extent that such claim does not arise out of the negligence of the contracting party." While this provision is a major step toward providing the necessary protection, AGC believes that some modifications in the provision are necessary to fully ensure that the protection the Committee intended is, in fact, realized.

The first suggested modification entails the need for a specified reserve fund to pay any claims. The Anti-Deficency Act (31 U.S.C. s665) apparently nullifies a federal government indemnification provision if a reserve of funds to cover the contingency are not specifically available. EPA has asked the General Accounting Office to issue a ruling on whether EPA had authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to indemnify contractors from liabilities associated with removal activity. GAO's response was that a reserve fund is necessary if EPA enters into an unqualified indemnity obligation.

AGC also recommends that the provision be revised to require that the Administrator offer indemnification on all response action contracts under the provision. Under the current discretionary language, a contractor would be placed in the position of negotiating with EPA for indemnification on each contract after the contract has been bid. The uncertainty as to whether the discretionary indemnification will be granted will cause severe problems in the bidding process. Contractors must have certainty, when he is bidding the contract, that third party liabilities will be indemnified so that he is able to make an adequate assessment of insurance costs and risk factors when preparing the bid.

It is anticipated that, in order to protect its own interests the Federal government will become involved in defending the contractor against third party claims. AGC recommends that this be specified in the legislation to be certain that the government will, in fact, be involved in the contractor's defense. The cost of litigation could very well put a contractor out of business, even if eventually exonerated, by the time a legal ruling is rendered. To assure that this will not happen, the Federal government must participate as a partner in litigation involving the cleanup contractors actions in compliance with the contract.

AGC urges expeditious modification to S. 51, as outlined, to assure increased competition and lower costs in the expanding hazardous waste cleanup program.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TWX: 710-822-9406 AGC WSH

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WALTER K. PRIESTER, *Treasurer* • HUBERT BEATTY, *Executive Vice President*

April 22, 1985

The Honorable Steven D. Symms
United States Senate
Committee on Environment and
  Public Works
Washington, D. C. 20510

Dear Senator Symms:

Enclosed are responses to the questions you sent as follow-up to the April 3, 1985 Superfund hearings held by the Senate Environment and Public Works Committee. We appreciate the opportunity to have these responses included in the hearing record and hope that they will assist your deliberations on the Superfund reauthorization legislation.

Thank you for your consideration.

Sincerely,

Brian Deery

Brian Deery
Associate Director
Municipal-Utilities Division

Enclosure

Questions for Mr. Deery

1. To what extent does the use of Small Business set-asides on construction contracts preclude or at least make less likely the selection of the best quality contractors?

2. Would you support an "open competition" requirement in Superfund?

3. Why do you believe a quality-based engineering selection process is more likely to provide clean-up contractors the finest quality plans and specifications? How important is this to assuring protection to the public in cleaning up Superfund sites? What significance does this have for the costs of clean-up and depletion of Superfund monies — does quality engineering make for lower or higher clean-up costs?

Response of the Associated General Contractors
to Questions Posed for the Record by
Senator Steven D. Symms

1. Public construction contracts are usually awarded through open competitive bidding procedures to the lowest responsible bidder. This process functions to assure the quality of the work and to prevent an unwarranted increase in the cost. In addition, competition encourages the efficient use of resources and the development of innovative approaches to problems. Whenever competition is reduced or in any way limited in the construction industry, there is always the possibility that less qualified contractors may be selected. There is also the probability that the award will not be made at the lowest price.

   The small business set-aside program substantially reduces competition in the construction industry. For example, in FY 1984, the Department of Defense restricted competition on 75 percent of its construction contract actions by removing them from the open market and by setting them aside for exclusive small business bidding. The increase in cost to the Federal government resulting from these actions is significant.

   A 1976 Report of Consultants to the Army Corps of Engineers on small business set-asides (dredging) found the following:

   > "...the low bids received under unrestricted advertisements were 9 percent lower than those received under set-asides..."

   This 9 percent projected cost increase does not include the administrative costs of running the program which can be significant.

   These increased costs are unnecessary because the goals of the small business set-aside program can be achieved without intervention in the free market. The open competitive bid system assures small businesses in the construction industry the opportunity to acquire their share of contracts. In fact, figures show that small businesses do as well in obtaining contracts under open competition as they do under the restricted bidding procedures of the set-aside program. Enclosed is a brochure which details the cost and impact of this program in the construction industry and documents why the program is unneeded.

2. Protecting the health and safety of all citizens by assuring the quality of the environment should be the primary goal of the Superfund program. This can best be achieved by assuring that the most qualified contractors are selected and that they perform the cleanup work in as efficient, economical and safe fashion as is possible. This can best be accomplished through open, unrestricted competition.

   Increasingly, requirements are being imposed that require that the award of public construction contracts be based on race, ethnic origin, sex or size of firm. These special preference procurement programs threaten to undermine the entire open, competitive bid system in the construction industry. With regards to the Superfund program, these programs raise significant questions regarding quality, cost and safety. AGC wholeheartedly endorses the inclusion of an "open competition" requirement in the Superfund program.

3. AGC supports the architect/engineer selection procedures for Federal government procurement as contained in the Brooks Bill, Public Law 92-582. These procedures provide for the selection of architectural and engineering services on the basis of qualifications and competence at a fair and reasonable fee to the government which is arrived at on a negotiated basis.

ICWM
Institute of Chemical Waste Management
1730 Rhode Island Avenue, N.W., Tenth Floor, Washington, D.C. 20036 • 202/659-4613

Testimony of

BRUCE J. PARKER
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

On Behalf of the

INSTITUTE OF CHEMICAL WASTE MANAGMENT

Before The

SENATE COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS

April 3, 1985

Good morning, Mr. Chairman and members of the Subcommittee. My name is Bruce J. Parker, and I am General Counsel for the National Solid Wastes Management Association. Mr. Ian Matheson, Director, Risk Management and Insurance, Genstar Corporation, has submitted detailed testimony for the record, and he intended to appear today to elucidate on that testimony and answer questions. Regrettably, an unavoidable business conflict will not permit Mr. Matheson's appearance today. Thus, with your permission I would like to very briefly highlight and elaborate upon some of the main points and observations in his testimony.

There is a legitimate crisis today because of the virtual absence of an insurance market to provide environmental impairment liability insurance (EIL). Effective January 1, 1985, virtually all major property/casualty insurers were confronted with absolute pollution exclusion within their treaty reinsurance renewals, thereby foreclosing pollution coverage to most policyholders even before the anticipated January 1, 1986 introduction of the revised Insurance Services Office (ISO) Comprehensive General Liability (CGL) form containing an absolute pollution exclusion.

You probably are also aware of the fact that Section 30 of the federal Motor Carrier Act of 1980 requires specified limits for financial responsibility for environmental restoration liability, the limits which range from $1 to 5 million depending upon the type of transportation and designation of the hazardous substance or materials transported by the motor carrier. I have been informed by the risk managers of several companies that this type of required insurance coverage is also on the endangered species list.

As commercial waste treatment and disposal firms frantically search to find coverage as their policies come up for renewal, they are staring at the November 8, 1985 RCRA deadline terminating interim status unless the facility owner certifies, among other things, compliance with the financial responsibility and insurance requirements at 40 CFR 265.147.

Candidly, satisfying these minimum regulatory requirements is not the principal problem resulting from this insurance crunch. Rather, it is the serious inability of the commercial waste industry to provide for insurance protection against a catastrophic losses due to environmental occurrences. Plain and simple, our companies are talking about preservation of assets and are being forced to make hard business decisions regarding future capital commitments to certain areas of operation in the absence of an available and financially competitive insurance market.

It is entirely possible that this situation could diminish the availability of professional waste management services with a resulting increase in public and environmental risk. As you know, 84 percent of those U.S. companies generating hazardous wastes (not including small quantity generators) are dependent for their waste management services or commercial companies. These companies as well as the small quantity generators -- to say nothing of the solid waste generators and haulers -- are those whose entire existence now hangs in the balance. Public companies may be particularly vulnerable because they would be effectively required to transfer the risk of environmental liabilities from insurers to their shareholders, the effect of which could impede the availabilities of monies necessary for usual operations. These larger companies are presently those most able to meet the financial responsibility requirements of the law and provide a substantial share of our national commercial treatment and disposal capacity.

The evaporation of EIL coverage not only threatens our RCRA program, but the cleanup program of Superfund as well. The liabilities assumed by cleanup contractors and the facilities which may receive spills or excavations are equally as uninsurable as those of RCRA, treatment, storage and disposal facilities.

It is safe to say that the evaporation of the EIL market is not due to perceptions of increased risks at hazardous waste facilities. Clearly this is a point that should be stressed and understood by the American public. Rather, the cause of the crisis has been attributed primarily to two factors: First, unhealthy market conditions for all property and casualty insurance coverages for which the insurance community itself by its own admission is not without fault. As Mr. Matheson points out in his testimony, in the fast-and-loose competitive atmosphere several years ago, the industry priced premiums at rates below acceptable actuarial rates, with the expectation that healthy investment income and available reinsurance would satisfy claims and still make a profit. It never turned out that way. Rather, for the first time the industry experienced a total net operating loss, and surplus of the property/casualty industry dropped remarkably. Surplus, which represents money committed to insurance, is the asset base upon which premium ratios, and therefore capacity, is predicated.

The second factor contributing to the crisis is the volatile judicial and regulatory climate in this country. Insurance is based upon predicability. At precisely the time when major segments of the property/casualty industry are clearly struggling for survival, the foreign reinsurance market perceives judicial and regulatory developments as creating unpredictability of a nature and magnitude that severely threatens to eradicate the already eroding surplus of the property/casualty industry. Jackson Township, Riehl v. Traveler's Insurance Co., and a list of other cases, have been described in great detail by members of the insurance industry to show tortured definitions of the term "occurrence" and unjustified expansion of the standard pollution exclusion clause in Comprehensive General Liability (CGL) coverage. Worse, insurers have been intimidated by a number of decisions, on appeal, that have held sudden, accidental and unintentional pollution coverage to apply even to on-site remediation.

To address what is euphamistically called the "victim's compensation" issue, we are seeing in Congress and in the states proposed legislation that would alter traditional causation rules, evidentiary standards and establish novel remedies. Even administrative no-fault compensation schemes could generate additional third-party liability claims as fund administrators replace private plaintiffs through subrogation - like lawsuits.

So, to where does all this lead? It is clear that solutions to this insurance crisis will not be easy to reach. We have made our concerns and views known to appropriate officials at U.S. EPA, but today's Congressional inquiry marks the beginning of the public process of attempting to separate fact from fiction regarding the causes of the current insurance crisis. Most important, this inquiry must examine all conceivable solutions to the problem, and the individual or interactive roles that commercial waste service firms, other regulated firms, the insurance industry and government can and should play in resolving this problem.

Thank you.

HAZARDOUS WASTE TREATMENT COUNCIL

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TESTIMONY

STEPHEN C. ZIMMER

SYSTECH CORPORATION

ON BEHALF OF

THE HAZARDOUS WASTE TREATMENT COUNCIL

BEFORE THE

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

REGARDING

ENVIRONMENTAL INSURANCE ISSUES

APRIL 3, 1985

Mr Chairman, Members of the Committee I am Stephen C. Zimmer, Vice President for Finance and Administration for Systech Corporation. I welcome the opportunity to testify this morning on behalf of the Hazardous Waste Treatment Council. I am accompanied this morning by Mr. Michael Mullen of Crowell and Moring.

The Treatment Council is a national association representing the commercial treatment and equipment manufacturing industry. Its membership, which is the largest of any such organization, is distinguished by its common commitment to the primary use of treatment and recycling technology and to the restricted use of land disposal in the management of hazardous wastes.

Systech Corporation operates three rotary cement kiln incinerators in Ohio, Kansas, and California. The fact that a firm such as Systech is testifying this morning on behalf of other treatment-oriented firms itself speaks to the serious and depth of the current environmental insurance crisis. Even firms such as ours with little or no land disposal activity are facing the prospect of no insurance coverage irrespective of our loss history or risk control capability.

The Problem

For firms that seek to properly manage hazardous wastes and to implement permanent cleanups of "Superfund" wastes the pollution liability insurance problem is two fold. First, the private market for non-sudden coverage as required by the current RCRA law and regulations has all but collapsed. We are also concerned that this suspension of coverage may be extended to the RCRA requirements for sudden releases, such as might occur with transportation, and even to general liability coverage in light of recent court decisions that have provided access to general liability policies for non-sudden pollution events. Second, the current liability of CERCLA cleanup contractors extends to such activity on a joint and several basis. This potential is one of the primary obstacles to expedited CERCLA cleanups, particularly those conducted by private parties, and unless clarified will also impede private party cleanups of continuing releases at active RCRA facilities as required by the recent RCRA amendments (P.L. 98-616).

Regarding the problems of RCRA insurance coverage several articles have been attached from Business Insurance, and the Wall Street Journal* that attest to the crumbling market for all forms of environmental insurance, particularly for non-sudden releases. There are some companies remaining in the pollution insurance market, however, these companies do not have sufficient capacity to insure all the firms that are required to obtain liability coverage for sudden and non-sudden releases under RCRA. While there is a possiblity that that some firms may re-enter the market, we believe this to be remote for an indefinite period. Indeed as the attached March 29, 1985 Journal of Commerce article attests, "One out of every five reinsurance companies around the world is in serious financial jeopardy."

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*The articles referred to have been retained in committee files.

The RCRA insurance picture is further complicated by the fact that the recent RCRA amendments require every RCRA treatment, storage, and disposal (TSD) facility to obtain insurance or demonstrate financial responsibility through one of the other financial instruments by November 8, 1985 or lose interim status and be forced to close.

Regarding insurance and liability for CERCLA cleanups both the House and Senate CERCLA reauthorizations have recognized the need to limit the liability of firms that perform response action pursuant to a plan approved by EPA or a state.

Section 124 of S. 51 allows EPA to "hold harmless and indemnify a contracting party against claims, including the expenses of litigation or settlement, by third persons for death, bodily injury or loss of or damage to property arising out of performance of a cleanup agreement to the extent that such a claim does not arise out of the negligence of the contracting party." Similarly, Section 106 of H.R. 5640 extended indemnification and the negligence standard to any response action contractor that enters into a contract or agreement with the Administrator, a State or any responsible party.

While these provisions protect certain response action contractors against claims of joint, strict, and several liability and thereby provide addtitional incentives for private insurance coverage, even when taken collectively they do not address several other aspects of the CERCLA response liability: the indemnification of S.51 is at the Administrator's discretion and limited to contractors who are engaged by the Agency or the States; the amendment in Section 106 of H.R. 5640 may not extend to those conducting the remedial investigation and feasibility studies (RIFS) even for actions conducted pursuant to an approved plan; and neither provision protects response action contractors from liability under any other provision of law, including state law.

Given the increasing number of private remedial and removal actions that are being and will be conducted at sites which are not on the National Prioirty List (NPL), and in light of the expanded cleanup requirements for continuing releases contained in the RCRA amendments (P.L. 98-616) there is an overriding need to limit the liability of response action contractors to a standard of negligence rather than one of joint strict and several liability. The exposure of cleanup contractors to this latter standard of liability stands as the single largest impediment to expedited and expanded private party cleanup of CERCLA sites and will similary hinder the containment and remediation of continuing releases at RCRA treatment, storage, and disposal facilities that seek a final permit. The negligence standard should not apply to any person engaged in cleanup work who was otherwise connected to the site as a past or present owner, operator, generator, disposer, or transporter. Such contractors should be held to a standard of joint, strict, and several liability as would the balance of responsible parties at the site that are not involved in the response action.

Treatment Council Recommendations

The Hazardous Waste Treatment Council makes the following legislative recommendations to the Committee for inclusion in the CERCLA reauthorization, several of which are discussed below in greater detail:

* retain the current RCRA financial responsibility requirements. These requirements serve as a vital adjunct to EPA enforcement and any private inspection program that may emerge pursuant to the recent RCRA amendments;

* retain the provisions of the recent RCRA amendments regarding termination of interim status for facilities that cannot demonstrate financial responsibility for corrective action by November, 1985. The Council does not believe that RCRA should be reopened only 5 months after the reauthorization process has concluded. Rather the Committee should conduct oversight on the implementation of this provision to ensure that the unforseen developments in the insurance field of recent months do not summarily terminate the permits of over 90% of current waste generators and managers. For purposes of defining compliance with these new RCRA provisions any facility that has had their policy cancelled within the past 12 months, or which can demonstrate a good faith effort to procure private insurance should qualify for placement on a compliance schedule in order to meet the terms of this provision. However, those facilities that have never obtained the necessary coverage or that have failed to make reasonable attempts to secure the necessary financial responsibility should lose interim status; ,

* amend the Risk Retention Act to allow companies to pool their pollution liability and set-up self-insured risk retention groups. Currently, this authority is only available to firms that seek to self-insure their "product liability" risks (see discussion below);

* further amend CERCLA respecting contractor liability by combining Section 124 of S. 51 and Section 106 of H.R. 5640 to prevent the application of joint, strict, and several liability to cleanup contractors at not only EPA and State approved cleanups but also to contractors engaged in private party cleanups and responses undertaken pursuant to the corrective action for continuing releases provision of the recent RCRA amendments. Strict liability for these response actions would be retained by the parties that had caused or contributed to the release, or in the case of RCRA response actions with the site owner/operator;

* in addition, Congress should send a signal to the courts regarding the interpretation of insurance policies. One of the primary reasons why the insurance industry has stepped back from the pollution liability insurance market is because the courts have construed comprehensive general liability insurance policies to provide coverage for damage caused by the gradual release of pollutants that is expressly excluded from coverage under these policies. Our members are insurance policyholders and want their policies broadly construed to cover all claims arising under these policies. We believe, however, that Congress has the authority particularly with respect to insurance contracts entered into after the date of enactment of the pending CERCLA amendments to set forth some general principles with respect to the interpretation of liability insurance contracts as they pertain to both sudden and non-sudden pollution liability damages; and,

* lastly, the Council would recommend that the Committee revisit the insurance issue in November of this year to review the progress that has been made in securing private coverage and/or self-insurance in order to determine the need, if any, for a Federal response or insurance mechanism (see discussion below).

Risk Retention Act Amendments

The Committee should propose amendments to the Risk Retention Act (RRA) to allow companies to pool thier pollution liability risks and set up self-insured risk retention groups (summary of the RRA is attached). In 1981, Congress enacted the Product Liability Risk Retention Act, 15 U.S.C. Section 3901 et seq., which allows a group of companies to self-insure their "product liability" risks. We strongly urge Congress to expand the Risk Retention Act to allow the coverage of pollution liability risks.

If no commercial insurance is available, then some mechanism for self-insurance is required in order to meet RCRA financial responsibility requirements. Large firms can self-insure on their own assets, but smaller firms find it difficult if not impossible to meet such a test. The simplified licensing authority available under the Risk

Retention Act is necessary for an association whose member companies operate facilities in several states.

Several states including Colorado, Deleware, Tennessee, Vermont and Virginia have passed laws for the licensing of self-insured groups called "captive insurance companies." The Vermont law is notable because it makes specific reference to the Risk Retention Act. Under Vermont law (see attached), a company can qualify for a license as an "industrial insured" if it meets the requirements of the RRA.

The RRA is significant in this context for several reasons. Generally, insurance companies are licensed under state law and if a group of companies engaged in the treatment of hazardous wastes which operates facilities in several different states wished to insure their members' pollution liability risks, they would be required to obtain a license as an insurance company in each state in which facilities are located and operations are conducted. The RRA simplifies regulation of self-insurance groups because a license is required in only one state and that state regulates the risk retention group and sets the standards for capital and surplus requirements of the group. Congress determined in enacting the RRA that it was necessary to exempt these self-insurance groups from the burdens of multiple and conflicting state insurance regulations.

When Congress found in 1981 that companies could not obtain product liability insurance, it enacted the RRA. Today, companies cannot obtain pollution liability insurance and Congress should, therefore, extend the RRA to allow coverage of these risks.

Facilitating a self-insurance program represents sound public policy because it will provide a pool of funds to pay claims and it will avoid the entanglements of a Federal insurance program.

Federal Insurance Options

In preparing our testimony, we have reviewed a number of Federal insurance-related laws including the Price-Anderson Act, the National Flood Insurance Program, the Offshore Oil Pollution Compensation Fund, and other laws establishing Federal insurance programs. All of these laws have some beneficial aspects as well as some limitations. All of these laws provide for participation by the Federal government when private insurance was unobtainable or inadequate. While this may be the solution of last resort to the present crisis, we believe it would be highly preferable for Congress to provide the tools and climate in which the private insurance market can meet this need.

HWTC Insurance Activities

Currently the Council is pursuing two different options to secure insurance coverage for our members and other qualified firms in the industry. First, the Council is assembling risk control profiles of the members and other participants in an attempt to attract group coverage for firms that meet underwriting criteria for risk control and loss prevention. While firms have had limited success in securing coverage individually, we believe there is a reasonable likelihood that the collective premiums of low risk operations will prove attractive to underwriters and reinsurers.

Concurrent with our group policy efforts we are also investigating the feasibility of forming a captive insurance firm to serve as either a complement to or substitute for private coverage. This course is clearly not a desirable one from the standpoint of many Council members. However, a captive insurance firm may be the only option available to waste generators and managers. The amendments to the Risk Retention Act that we have identified would enhance our ability to secure this type of self-insurance coverage as a last resort short of a Federally instituted program, or an assigned risk pool.

CONCLUSION

In summary, a combination of the Bophal incident, recent judicial rulings that hold general liability policies responsible for non-sudden pollution releases, substantial losses in other insurance fields, the failure of many insurers to fully investigate and differentiate between the risks of different facilities, and current structure and scope of the liability provisions of current law have contributed to a general atmosphere of panic in the insurance community and a collapse of the market for pollution liability coverage in general.

While all of these concerns and problems cannot and should not be redressed through legislation, certain limited amendments to CERCLA are necessary at this time in order to provide response contractors, insurers and the private sector in general with the tools to resolve this crisis without direct Federal involvement.

The amendments discussed in the testimony are a necessary but by themselves an insufficient response to the full scope of the environmental pollution insurance crisis. The solution also will require a dedicated effort on the part of waste generators and managers to demonstrate and practice risk control during all phases of waste management, and a similar level of effort on the part of the underwriters and reinsurers to distinguish between the risks posed by various facilities and to understand that all waste generators and managers are not just so many apples in the basket.

Without a stable environment for insurance coverage and without a dedicated commitment to risk control and loss prevention on the part of all parties involved the transition to and the permitting and siting of even environmentally sound treatment, recycling and disposal facilities that eliminate long-term liabilities will be delayed if not permanently compromised.

I appreciate the opportunity to testify before the Committee on this most important issue, and look forward to working with you through the balance of the reauthorization process.

PUBLIC ACT NO. 28

CAPTIVE INSURANCE COMPANIES

Department of Banking and Insurance
120 State Street
Montpelier, Vermont 05602

TITLE 8, VERMONT STATUTES ANNOTATED, CHAPTER 141

CAPTIVE INSURANCE COMPANIES

Sec. 1. 8 V.S.A. Chapter 141 is added to read:

CHAPTER 141. CAPTIVE INSURANCE COMPANIES

§ 6001. DEFINITIONS

As used in this chapter, unless the context requires otherwise:

(1) "Affiliated company" means any company in the same corporate system as a parent, an industrial insured, or a member organization by virtue of common ownership, control, operation, or management.

(2) "Association" means any legal association of individuals, corporations, partnerships, or associations that has been in continuous existence for at least one year, the member organizations of which collectively

(A) own, control, or hold with power to vote all of the outstanding voting securities of an association captive insurance company incorporated as a stock insurer, or

(B) have complete voting control over an association captive insurance company incorporated as a mutual insurer.

(3) "Association captive insurance company" means any company that insures risks of the member organizations of the association, and their affiliated companies.

(4) "Captive insurance company" means any pure captive insurance company, association captive insurance company, or industrial insured captive insurance company formed or licensed under the provisions of this chapter.

(5) "Commissioner" means the commissioner of the department of banking and insurance.

(6) "Industrial insured" means an insured

(A) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer, and

(B) whose aggregate annual premiums for insurance on all risks total at least $25,000.00, and

(c) who has at least 25 full-time employees.

(7) "Industrial insured captive insurance company" means any company that insures risks of the industrial insureds that comprise the industrial insured group, and their affiliated companies.

(8) "Industrial insured group" means any group of industrial insureds that collectively

(A) own, control, or hold with power to vote all of the outstanding voting securities of an industrial insured captive insurance company incorporated as a stock insurer, or

(B) have complete voting control over an industrial insured captive insurance company incorporated as a mutual insurer.

(9) "Member organization" means any individual, corporation, partnership, or association that belongs to an association.

(10) "Parent" means a corporation, partnership or individual that directly or indirectly owns, controls, or holds with power to vote more than 50 per centum of the outstanding voting securities of a pure captive insurance company.

(11) "Pure captive insurance company" means any company that insures risks of its parent and affiliated companies.

§ 6002. LICENSING; AUTHORITY

(a) Any captive insurance company, when permitted by its articles of association or charter, may apply to the commissioner for a license to do any and all insurance comprised in subdivisions (3)(A)-(C), 3(E)-(R) and (4)-(9) of section 3301(a); provided, however, that:

(1) no pure captive insurance company may insure any risks other than those of its parent and affiliated companies;

(2) no association captive insurance company may insure any risks other than those of the member organizations of its association, and their affiliated companies;

(3) no industrial insured captive insurance company may insure any risks other than those of the industrial insureds that comprise the industrial insured group, and their affiliated companies;

(4) no captive insurance company may provide personal motor vehicle or homeowner's insurance coverage or any component thereof; and

(5) no captive insurance company may accept or cede reinsurance except as provided in section 6011 hereof.

(b) No captive insurance company shall do any insurance business in this state unless:

(1) it first obtains from the commissioner a license authorizing it to do insurance business in this state;

(2) its board of directors holds at least one meeting each year in this state;

(3) it maintains its principal place of business in this state; and

(4) it appoints a resident registered agent to accept service of process and to otherwise act on its behalf in this state. Whenever such registered agent cannot with reasonable diligence be found at the registered office of the captive insurance company, the secretary of state shall be an agent of such captive insurance company upon whom any process, notice, or demand may be served.

(c)(1) Before receiving a license, a captive insurance company shall file with the commissioner a certified copy of its charter and bylaws, a statement under oath of its president and secretary showing its financial condition, and any other statements or documents required by the commissioner.

(2) In addition to the information required by subdivision (1) of subsection (c), each applicant captive insurance company shall file with the commissioner evidence of the following:

(A) the amount and liquidity of its assets relative to the risks to be assumed;

(B) the adequacy of the expertise, experience, and character of the person or persons who will manage it;

(C) the overall soundness of its plan of operation;

(D) the adequacy of the loss prevention programs of its parent, member organizations, or industrial insureds as applicable; and

(E) such other factors deemed relevant by the commissioner in ascertaining whether the proposed captive insurance company will be able to meet its policy obligations.

(d) Each captive insurance company shall pay to the commissioner a nonrefundable fee of $200.00 for examining, investigating, and processing its application for license. In addition, it shall pay a license fee for the year of registration and a renewal fee for each year thereafter of $300.00.

(e) If the commissioner is satisfied that the documents and statements that such captive insurance company has filed comply with the provisions of this chapter, he may grant a license authorizing it to do insurance business in this state until April 1 thereafter, which license may be renewed.

§ 6003. NAMES OF COMPANIES

No captive insurance company shall adopt a name that is the same, deceptively similar, or likely to be confused with or mistaken for any other existing business name registered in the state of Vermont.

§ 6004. MINIMUM CAPITAL; LETTER OF CREDIT

No pure captive insurance company, association captive insurance company incorporated as a stock insurer, or industrial insured captive insurance company incorporated as a stock insurer shall be issued a license unless it shall possess and thereafter maintain unimpaired paid-in capital of:

(1) in the case of a pure captive insurance company, not less than $100,000.00,

(2) in the case of an association captive insurance company incorporated as a stock insurer, not less than $400,000.00, and

(3) in the case of an industrial insured captive insurance company incorporated as a stock insurer, not less than $200,000.00.

Such capital may be in the form of cash or an irrevocable letter of credit issued by a bank chartered by the state of Vermont or a member bank of the Federal Reserve System and approved by the commissioner.

§ 6005. MINIMUM SURPLUS; LETTER OF CREDIT

No captive insurance company shall be issued a license unless it shall possess and thereafter maintain free surplus of:

(1) in the case of a pure captive insurance company, not less than $150,000.00,

(2) in the case of an association captive insurance company incorporated as a stock insurer, not less than $350,000.00,

(3) in the case of an industrial insured captive insurance company incorporated as a stock insurer, not less than $300,000.00,

(4) in the case of an association captive insurance company incorporated as a mutual insurer, not less than $750,000.00, and

(5) in the case of an industrial insured captive insurance company incorporated as a mutual insurer, not less than $500,000.00.

Such surplus may be in the form of cash or an irrevocable letter of credit issued by a bank chartered by the state of Vermont or member bank of the Federal Reserve System and approved by the commissioner.

§ 6006. FORMATION OF CAPTIVE INSURANCE COMPANIES IN THIS STATE

(a) A pure captive insurance company shall be incorporated as a stock insurer with its capital divided into shares and held by the stockholders.

(b) An association captive insurance company or an industrial insured captive insurance company may be incorporated

(1) as a stock insurer with its capital divided into shares and held by the stockholders, or

(2) as a mutual insurer without capital stock, the governing body of which is elected by the member organizations of its association.

(c) A captive insurance company shall have not less than three incorporators of whom not less than two shall be residents of this state.

(d) Before the articles of association are transmitted to the secretary of state, the incorporators shall petition the commissioner to issue a certificate setting forth his finding that the establishment and maintenance of the proposed corporation will promote the general good of the state. In arriving at such finding the commissioner shall consider:

(1) the character, reputation, financial standing and purposes of the incorporators;

(2) the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors; and

(3) such other aspects as the commissioner shall deem advisable.

(e) The articles of association, such certificate, and the organization fee shall be transmitted to the secretary of state, who shall thereupon record both the articles of incorporation and the certificate.

(f) The capital stock of a captive insurance company incorporated as a stock insurer shall be issued at not less than par value.

(g) At least one of the members of the board of directors of a captive insurance company incorporated in this state shall be a resident of this state.

(h) Captive insurance companies formed under the provisions of this chapter shall have the privileges and be subject to the provisions of the general corporation law as well as the applicable provisions contained in this chapter. In the event of conflict between the provisions of said general corporation law and the provisions of this chapter, the latter shall control.

§ 6007. REPORTS AND STATEMENTS

(a) Captive insurance companies shall not be required to make any annual report except as provided in this chapter.

(b) Prior to March 1 of each year, each captive insurance company shall submit to the commissioner a report of its financial condition, verified by oath of two of its executive officers. Each association captive insurance company shall file its report in the form required by section 3561. The commissioner shall by rule propose the form in which pure captive insurance companies and industrial insured captive insurance companies shall report.

§ 6008. EXAMINATIONS AND INVESTIGATIONS

At least once in three years, and whenever the commissioner determines it to be prudent, he shall personally, or by some competent person appointed by him, visit each captive insurance company and thoroughly inspect and examine its affairs to ascertain its financial condition, its ability to fulfill its obligations and whether it has complied with the provisions of this chapter. The commissioner upon application, in his discretion, may enlarge the aforesaid three-year period to five years, provided said captive insurance company is subject to a comprehensive annual audit during such period of a scope satisfactory to the commissioner by independent auditors approved by him. The expenses and charges of the examination shall be paid to the state by the company or companies examined and the finance director shall issue his warrants for the proper charges incurred in all examinations.

§ 6009. GROUNDS AND PROCEDURES FOR SUSPENSION OR REVOCATION OF LICENSE

(a) The license of a captive insurance company to do an insurance business in this state may be suspended or revoked by the commissioner for any of the following reasons:

(1) Insolvency or impairment of capital or surplus;

(2) Failure to meet the requirements of sections 6004 or 6005;

(3) Refusal or failure to submit an annual report, as required by section 6007, or any other report or statement required by law or by lawful order of the commissioner;

(4) Failure to comply with the provisions of its own charter or bylaws;

(5) Failure to submit to examination or any legal obligation relative thereto, as required by section 6008;

(6) Refusal or failure to pay the cost of examination as required by section 6008;

(7) Use of methods that, although not otherwise specifically prohibited by law, nevertheless render its operation detrimental or its condition unsound with respect to the public or to its policyholders;

(8) Failure otherwise to comply with the laws of this state.

(b) If the commissioner finds, upon examination, hearing, or other evidence, that any captive insurance company has committed any of the acts specified in subsection (a), he may suspend or revoke such license if he deems it in the best interest of the public and the policyholders of such captive insurance company, notwithstanding any other provision of this title.

§ 6010. LEGAL INVESTMENTS

(a) An association captive insurance company shall comply with the investment requirements contained in sections 3461-3472, as applicable.

(b) No pure captive insurance company or industrial insured captive insurance company shall be subject to any restrictions on allowable investments whatever, including those limitations contained in sections 3461-3472; provided, however, that the commissioner may prohibit or limit any investment that threatens the solvency or liquidity of any such company.

§ 6011. REINSURANCE

(a) Any captive insurance company may provide reinsurance, comprised in section 3301(a), on risks ceded by any other insurer.

(b) Any captive insurance company may take credit for reserves on risks ceded to a reinsurer; provided, however, that no captive insurance company shall reinsure a risk or part thereof with reinsurers not complying with the provisions of section 3633.

§ 6012. RATING ORGANIZATIONS; MEMBERSHIPS

No captive insurance company shall be required to join a rating organization.

§ 6013. EXEMPTION FROM COMPULSORY ASSOCIATIONS

No captive insurance company shall be permitted to join or contribute financially to any plan, pool, association, or guaranty or insolvency fund in this state, nor shall any captive insurance company, or its insured, or its parent or any affiliated company, or any member organization of its association, receive any benefit from any such plan, pool, association, or guaranty or insolvency fund for claims arising out of the operations of such captive insurance company.

§ 6014. TAX ON PREMIUMS COLLECTED

(a) Each captive insurance company shall pay to the commissioner of taxes, in the month of February of each year, a tax at the rate of one percent on the gross amount of all premiums collected or contracted for on policies or contracts of insurance covering property or risks in this state and on risks and property situated elsewhere upon which no premium tax is otherwise paid during the year ending December 31 next preceding, after deducting from the gross amount of premiums subject to the tax the amount received as reinsurance premiums on business in the state and the amount paid to policyholders as return premiums which shall include dividends on unabsorbed premiums or premium deposits returned or credited to policyholders.

(b) The tax provided for in this section shall constitute all taxes collectible under the laws of this state from any captive insurance company, and no other occupation tax or other taxes shall be levied or collected from any captive insurance company by the state or any county, city, or municipality within this state, except ad valorem taxes on real and personal property used in the production of income.

§ 6015. RULES AND REGULATIONS

The commissioner may establish and from time to time amend such rules relating to captive insurance companies as are necessary to enable him to carry out the provisions of this chapter.

§ 6016. LAWS APPLICABLE

No provisions of this title, other than those contained in this chapter or contained in specific references contained in this chapter, shall apply to captive insurance companies.

AMENDMENT TO VERMONT CAPTIVE INSURANCE COMPANIES ACT

Purpose: Since the Congress of the United States has enacted Public Law 97-45 authorizing the creation of risk retention groups for the purpose of insuring against the product liability or completed operations liability of the members of such groups, and in order to encourage chartering of such groups in the State of Vermont so as to generate economic benefit for the state and also to protect the public by appropriate regulation of such activity; and to avoid application of the Vermont Act in manners for which it was not intended and which would increase regulatory costs for this state without generating any economic benefits:

Sec. 1. 8 V.S.A. § 6001(8) is amended to read:

§ 6001. DEFINITIONS

(8) "Industrial insured group" means any group [of industrial insureds that collectively] that meets either of the following criteria:

(A) any group of industrial insureds that collectively

[(A)] (i) own, control, or hold with power to vote all of the outstanding voting securities of an industrial insured captive insurance company incorporated as a stock insurer, or

[(B)] (ii) have complete voting control over an industrial insured captive insurance company incorporated as a mutual insurer[.] ; or

(B) any group which is created under the Product Liability Risk Retention Act of 1981 (U.S. Public Law 97-45) as a corporation or other limited liability association taxable as a stock insurance company or a mutual insurer under the law of the State of Vermont:

(i) whose primary activity consists of assuming and spreading all, or any portion, of the product liability or completed operations liability risk exposure of its group members; and

(ii) which is organized for the primary purpose of conducting the activity described in subparagraph (i) herein above; and

(iii) which does not exclude any person from membership in the group solely to provide for members of such group a competitive advantage over such a person; and

(iv) which is composed of members each of whose principal activity consists of the manufacture, design, importation, description, packaging, labeling, lease, or sale of a product or products.

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May 10, 1985

The Honorable Robert T. Stafford, Chairman
Committee on Environment and Public Works
United States Senate
Room SD-410
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The following views are presented on behalf of the American Bar Association. The Board of Governors of the Association has adopted the resolution contained herein to emphasize the importance of the issues previously raised by the Section of Public Contract Law of the American Bar Association. The Chairperson of the Section of Public Contract Law has been authorized to communicate these views on behalf of John C. Shepherd, the President of the American Bar Association.

The American Bar Association has serious concerns regarding the potential liability of contractors and engineers involved in Superfund remedial or removal activities on behalf of the Environmental Protection Agency, the Corps of Engineers, or states acting under cooperative agreements with EPA. Potential liabilities for these contractors arise not only out of the common law theories of negligence, but also arise by virtue of the various statutory provisions found in the Superfund legislation, and additionally, in the related Resource Conservation and Recovery Act (RCRA), as amended. Further, state laws may impose stricter standards of liability than the Federal statutes. There is a real potential for suits brought by workers, adjacent property owners and residents, nearby businesses, and anyone remotely in contact with a hazardous waste at any point in its analysis, containment, removal or treatment.

We understand that the Environmental Protection Agency is offering indemnification to its clean-up engineers. More recently, the Corps of Engineers (under the inter-agency Memorandum dated April 11,

SECTION OF PUBLIC CONTRACT LAW

1983), has begun to utilize the indemnification provisions published at 49 Fed. Reg. 8877 (March 8, 1984) for engineers hired to design remedial actions. The present indemnification arrangement, however. does not offer adequate protection or relief to engineers and contractors inasmuch as it requires as a prerequisite the obtaining of insurance which may not be available within the marketplace and, secondly, makes any indemnification contingent upon the availability of appropriations.

The availability of "pollution insurance" has been dramatically curtailed by the near inability to purchase environmental impairment liability coverage and exclusions added to general liability policies. At present, the international reinsurance market is either generally uninterested in providing the essential reinsurance or will be insisting on utilization of language such as the "Absolute Pollution Exclusion". Of equal concern is that no particular appropriations are identified in the present indemnification provision nor has any such funding been provided by Congress. Further, as liability in this particular field may not manifest itself for many years after available appropriations may be exhausted, the protections of the indemnification provisions presently available are illusory. The funding problem has been focused by the literal interpretation adopted by the United States General Accounting Office regarding the application of the Anti-Deficiency Act, 31 U.S.C. §1341.

Even the present Federal indemnification is not available to many of the contractors performing Superfund remedial and removal actions. The Corps of Engineers has not been authorized to extend Federal indemnity to construction contractors on remedial action projects. Nor has Federal indemnification been extended to cover design or construction contractors working under state cooperative agreements with EPA. On the state level, the result has been the development of a patchwork of indemnification schemes, few of which are beneficial to the clean-up contractor. The State of New Hampshire, for example, has included in its Superfund remedial construction contracts an indemnification clause under which the construction contractor agrees to indemnify both the state and the engineer "from and against all claims" provided that the claim, damage or loss "is caused in whole or in part by any negligent or willful act or omission of the contractor."

Because of the interest in assuring that qualified and responsible firms are available to conduct hazardous waste remedial and removal actions, the Board of Governors of the American Bar Association has adopted the following resolution:

> BE IT RESOLVED THAT:
>
> The Section of Public Contract Law of the American Bar Association supports the

> enactment of provisions in the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA-Superfund), Public Law 96-510 (Expiring September 30, 1985), and appropriate regulations, policy and contract clauses that would provide for effective contractor indemnification and insurance from liabilities arising out of contractual performance of services and functions necessary for removals, responses and remedial actions to control or clean up hazardous wastes, pollutants or contaminants as authorized or required by CERCLA.
>
> BE IT FURTHER RESOLVED: That by adopting the above resolution the American Bar Association does not take a position on the question of what parties, if any, may be liable for any sums indemnified, nor is the Association suggesting what determination be made as to ultimate liability or the defenses which can be asserted by or against any responsible party.

It is firmly believed that the availability of effective contractor indemnification and insurance will greatly facilitate the successful implementation of the important national interest and objectives called for by CERCLA. Without such availability, responsible contractors will not be able to provide the necessary services and functions essential to the achievement of the Act's purposes. It is important that the Congress consider adopting appropriate legislative language which will allow the private market place to again provide adequate insurance and to require that indemnification be provided where adequate insurance cannot be purchased.

The American Bar Association offers the assistance of its membership, and particularly those in the Section of Public Contract Law, to work with the appropriate Committees of Congress and the United States Environmental Protection Agency in achieving the goals of the above resolution. We would very much appreciate the inclusion of this letter in the record of hearings held earlier by the Committee on this matter.

Sincerely,

Ruth C. Burg

Ruth C. Burg
Chairperson
Section of Public Contract Law

cc: The Honorable Lloyd Bentsen
Ranking Minority Member
Committee on Environment and
Public Works
United States Senate
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EnviroLogic Data
William M. Nugent
Executive Vice President
Chief Operating Officer
207/773-3020

1 April 1985

The Honorable George J. Mitchell
United States Senate
364 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Mitchell:

I understand that the Senate Environment and Public Works Committee shortly will hold hearings on the collapse of the Environmental Impairment Liability (EIL) insurance market and the effects of that collapse on the management of hazardous wastes. Given the vital role that adequate insurance coverage plays in responsible hazardous-waste management, these hearings are timely and important.

But I am concerned that, if the hearings focus solely on insurance for waste handlers, the Senate's inquiry will be limited, and any proposed remedy may be too narrow in its effect. A stable EIL insurance market is critical to all elements of chemical production, distribution, use, and disposal.

The Bhopal tragedy and similar incidents appear to have panicked the insurance community. It is not only those who handle hazardous wastes who are losing coverage, or facing premium increases so great and coverage limitations so severe that the remaining coverage provides only the appearance of coverage.

It is ironic that this insurance panic has spread so far as to batter a company such as ours, a small environmental and health risk assessment firm. We, and firms like ours, gather data and research the world's scientific literature to better define--and thereby, hopefully--reduce the risks posed by hazardous substances.

Nevertheless, while typically we come no closer to chemicals than the pieces of paper describing their effects, our professional errors-and-omissions insurance premiums have risen in nightmarish fashion. Last year (the year which ended 23 April 1985) our full coverage cost $6,000 and included a $1,000 deductible. This year's policy, written with extensive exclusions, will cost $48,300 plus a $25,000 deductible. This policy will provide no coverage for work in any way related to asbestos.

One important key to living and working safely and beneficially with chemicals is the development and dissemination of full, complete, and scientifically accurate information about them. Envirologic Data's staff of toxicologists and professional health researchers, while small, is rapidly growing, but it won't continue to be if our insurance premiums continue to rise at more than 700 percent per year and provide ever skimpier protection. Both those who select, use, and dispose of hazardous chemicals and you who make public policy in this enormously complex area will find your work even more difficult if the insurance panic drives companies such as ours out of business.

I will appreciate your

- including these comments in the Committee's record of the hearings,
- working to stabilize the insurance market for all elements of the chemical cycle, including risk assessors, and
- keeping us informed, to the extent it is reasonably possible (given the size of your staff and the demands on its time), of the progress in this area.

If we can help, let us know. As a new resident of Maine (and no stranger to senior government service), I look forward to meeting you soon.

Sincerely,

Bill Nugent

TESTIMONY OF

R. C. RILEY, CPCU

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.

BEFORE THE

SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

WASHINGTON, D. C.

APRIL 3, 1985

My name is R. C. Riley. I am an insurance agent from Benton, Kentucky. I represent the Independent Insurance Agents of America (IIAA) which is a trade association of 34,000 agencies, 126,000 producers, and 220,000 employees who sell all types of insurance.

IIAA members represent more than one company, and as such attempt to provide a choice of insurance coverages to their clients. Our members not only advise clients about insurance, but also recommend loss prevention and safety ideas that can cut costs. Our role is to find the best insurance coverage available in the marketplace to protect our clients' assets. Our intermediate position in the insurance sales process makes us acutely aware of the needs of, and problems faced by, both insurance consumers and the insurance industry. This is precisely why we are here today.

I am Chairman of the Pollution Task Force created on March 16, 1985, by the Executive Committee of the IIAA. The IIAA Pollution Task Force was created to act as a catalyst to bring together and work with industry and governmental forces in order to make various types of pollution insurance available in the marketplace.

Pollution Insurance is no longer readily available to insureds who must meet financial responsibility requirements set forth in existing legislation and regulations. Our membership is struggling with the fact that our clients can no longer be served by the marketplace. They cannot purchase Pollution Liability insurance required under state and federal regulations in order to stay in business. This availability problem is consistent in all parts of the country. There is a crisis. Pollution Insurance is not available. The private sector has withdrawn from this market. The reasons for this must be explored.

Let me cite a personal example that will make very clear the problem many businesses are currently facing.

I have a client who is required to provide "Sudden & Accidental" Pollution coverage to meet state and federal regulations. He has been in business since 1980 and has steadily grown to the point that he now employs over 50 individuals. By many standards, this would be a small employer; however, I think he would be typical of thousands of other businesses across America.

Fortunately, for the past five years I have been in a position to acquire for my client the needed General Liability coverages that automatically included "Sudden & Accidental" Pollution. In January, he received a notice from his insurance carrier that effective April 9,.1985, his insurance would be non-renewed. The insurance carrier informed me their reason for non-renewal was that they were unable to obtain needed reinsurance and therefore could not provide insurance for any risk with a pollution exposure.

Since January, on behalf of this one insured, I have contacted over 40 insurance companies and mailed over 2,300 pages of applications and information to various markets. As of March 25, 1985, I have been unable to find any insurance carrier willing to provide coverage and/or the necessary required liability limits to keep him in regulatory compliance with state and federal law. If insurance is unavailable on April 9, 1985, what are his options? He will have to either be out of compliance with E.P.A. regulations and subject to substantial fines, or shut his doors.

This is one example. In my discussion with agents almost every one has a similar horror story, even if it's in conjunction with a farmer and his use of fertilizer. We are currently gathering specific examples.

Government studies have identified 10,000 accounts with a hazardous waste exposure. There are probably hundreds of thousands of businesses with some minor pollution exposure.

Just as the need for Pollution Liability coverage is beginning to accelerate, the market for this insurance has collapsed. The unavailability of pollution liability insurance has two sources: the unstructured expansion of pollution liability theory by statute and case law; and the current overall capacity crunch in the property-casualty insurance market place. Many insurers facing capacity problems on an all lines combined basis will no longer write any pollution insurance in an atmosphere where courts require unintended or uninsurable pollution risks to be covered, when instead they could better use their same limited capacity to write other defineable, predictable lines of true insurance. This is true in both the direct insurance market and the reinsurance market.

Under current circumstances the insurance industry is unable to meet the insurance needs of those businesses subject to federal and state environmental financial responsibility requirements. To complicate matters, Insurance Services Office, the major insurance industry rates, rules, and forms organization, has filed, and already received approval in many states, a total exclusion for pollution. Although the ISO policy allows pollution coverage for an additional charge, through a buy back endorsement, insurors are already excluding this coverage from the majority of accounts on renewal, and few if any will offer the buy back.

The pollution issue is not one but a complex combination of issues and certainly not subject to a quick fix. To make Pollution Insurance available in the marketplace will involve creativity, compromise, and cooperation. In the marketplace, the regulatory and judicial approach taken toward certain types of pollution situations impacts the availability of insurance to cover not only that type but also other types of pollution situations. Therefore, although pollution situations are of different types, any approach to deal with some types of pollution situations should be considered in light of its impact on others.

The IIAA believes that treatment of the various pollution issues must start with identification and separation of the insurable from the uninsurable pollution situations. For example, society seems in unanimous agreement that identified pollution sites must be cleaned up. However, in such cases, where a given pollution situation is not a proper subject for insurance, some other approach must be taken to address it. These may be termed the uninsurable, or perhaps "social", pollution situations.

Clearly, cleanup of past environmental pollution should be treated as a social issue. It must be addressed as the uninsurable exposure that it is.

The proper method to achieve this is open to debate. We believe the cost of such cleanup efforts is not within the meaning or proper role of insurance. These tremendous losses have already occurred. The cost and method to correct the situation is the issue. Funding such cleanup is not realistically an insurance issue. Insurance is the process of sharing risk of possible future losses and spreading it over an equitable rating base.

If insurance carriers are forced to remain responsible for such cleanup activities, the cost of the cleanup will deplete the capacity of insurance carriers to provide other forms of insurance, including coverage for insurable pollution risks. From our perspective this part of the pollution problem is truly a social issue. It must be legislatively addressed and not transferred to the insurance industry.

Those creating hazardous wastes or potential pollutants should share in the cost of treating, storing. or cleaning up. However, the very high cost of litigation in pollution cases must be eliminated or greatly reduced. One way to reduce litigation costs is to allow creaters of pollutants to transfer the risks to the transporters and disposers of hazardous wastes, in return for a fee. In lieu of liability in cases where the transporter or disposer is negligent, manufacturers could pay a tax at the time they create or transfer hazardous substances to someone else. The tax could go to pay for cleanup of spills or leakages on a no-fault basis, eliminating from the system the high litigation costs that benefit no one.

The legislative, judicial and regulatory climate on environmental issues in the United States has become so unpredictable that even the strongest and most willing underwriters have decided to abandon the Environmental Liability insurance market.

As an example, since 1976, the insurance industry has made a clear attempt to provide Pollution Coverage for "Sudden & Accidental" exposures. Unfortunately, the courts have virtually destroyed the industry's effort to provide "Sudden & Accidental" coverage by distorting the intent to provide "Sudden & Accidental". They have broadened it to include "Non-Sudden or Gradual" Pollution. As a result, insurers will no longer write either.

Insurors are not sure what obligations the courts or statutory provisions impose upon them. If the courts will not allow the insurance companies to define what risks they intend to cover and have their policies properly interpreted, there is simply no way the insurance industry can or will choose to write pollution coverages in the future. This problem is one we as the industry must address through legislatures and we fully intend to do that.

Congress must restructure legislation to clearly separate the administration and funding of cleaning up uninsurable pollution situations, so that the private insurance industry can address the insurable pollution liability exposures. For example, this may require that legislation clearly define what is, and what is not, a "Sudden & Accidental", and a "Non-Sudden or Gradual", pollution situation. Perhaps financial responsibility requirements in lieu of insurance are appropriate in some cases. Perhaps pollution that occurred in the past must be treated differently than pollution occurring in the future. Perhaps a pooling arrangement should be developed for either direct insurance or the reinsurance of pollution exposures. Other issues include liability related to causation, presumptions of liability, retroactive liability, strict liability, joint and several liability, federal causes of action, actuarially sound pricing, high standards of loss prevention and safety compliance, strict enforcement, standardized policy forms, and claims made policies. At this time we do not have proposed solutions to all of these problems. However, we are in the process of bringing together all insurance industry forces to study these problems and recommend solutions. We intend to fully explore all reasonable options, including pooling arrangements, that can adequately respond to this availability crisis.

The IIAA estimates that at least 80% of pollution situations existing today are insurable exposures. Even though the insurance industry is experiencing extremely difficult times, and particularly regarding Pollution, we feel the insurance industry can provide the needed Pollution coverages. To do so we need Congress to restructure legislation to clearly separate the administration and cleanup costs of already recognized polluted sites. Further we need a better, perhaps legislative, definition of "Sudden & Accidental" Pollution, thereby making the Pollution exposure measurable, predictable, and insurable. Because of recent court decisions, liability underwriters have come to the conclusion..."if we cannot underwrite what we intend to underwrite, we shall not underwrite at all...".

We are at a crossroads. The Independent Insurance Agents of America feel that proper legislative amendments to Superfund liability and financial responsibility requirements will be necessary to encourage an insurance market to develop. The complexity of these issues will require great effort, analysis, clear thinking, and a spirit of fairness.

If these issues can be addressed in this session of Congress, we strongly believe the insurance industry will provide coverage to the high percentage of the insurable cases where American businesses need Pollution Coverage. If remedies are not fashioned and implemented quickly, possibly all of the insurable exposures will be uninsured on or before January 1, 1986.

We believe the insurance industry can and should bear the risks of "Sudden & Accidental" Pollution. We also believe that the complicated issues caused by a combination of "uninsurable, "social", and "insurable" issues can be separated and clearly defined.

The Independent Insurance Agents of America, on behalf of the insurance buying public and all parties involved in the environmental issues, ask for all parties to enter into constructive communication to seek solutions. Because of the magnitude, this problem must be solved with a legislative and industry coalition to develop solutions that are fair to all parties.

We are here today to testify to the fact there is a "pollution crisis" and that needed pollution coverages are no longer available in the marketplace.

Our economic system of free enterprise encourages capital to be committed to making a profitable return on investment. The fact that insurance carriers will not commit their capital and surplus to providing a market for Pollution is clear evidence that our existing laws and regulations must be amended in order for insurance to be available to meet the financial responsibility requirements placed upon American businesses. Without the necessary insurance, many of these businesses, large and small, will be forced either to shut down or to operate in violation of legal requirements.

IIAA is here today to pledge its support to help devise solutions to the Pollution problems. This may require some sort of pooling arrangement for either direct insurance or reinsurance of pollution exposures. We strongly urge Congress to reauthorize the Superfund and direct it to monitor hazardous waste sites and begin the cleanup on the 10,000 sites already identified. We will continue to work with all parties. We will attempt to spearhead an all-industry solution so that the industry can provide the risk bearing capital for insuring "Sudden & Accidental" coverage. As part of this all-industry forum, we are determined to explore ways to cope with, not only past and present liability exposure, but, more importantly, insurance for prospective pollution liability exposure.

This is a crisis. We must act responsibly now, so that society will be better able to deal with the environmental disasters which have already occurred and those to happen in the future.

Thank you for the opportunity to testify.

Mr. Chairman, members of the Committee, Distinguished guests, Ladies and Gentlemen:

My name is Glen Winter of Fargo, North Dakota. I am employed as President and General Manager of K and L Insulation. We have been actively involved in asbestos abatement for the last five years.

The asbestos abatement industry is a young industry using very rapidly developing technology. As with any emerging industry, ours has struggled with and overcome many problems during these early years of development. We are now struggling with a problem that we cannot overcome without help; your help. It is not a local or regional problem, it is a national problem. It is not a problem which affects only our industry, it affects every child, teacher, employee, patient, resident or administrator who spends time in one of the millions of buildings which contain asbestos; virtually every man, woman and child in America. It is a problem which is seriously hampering the expedient removal of a known health hazard from our schools, hospitals, nursing homes, churches and commercial buidings; that hazard is asbestos and the problem involves insurance.

Some months ago, one by one, asbestos abatement contractors were told their liability insurance was being cancelled or would not be renewed. This trend began as individual insurance carriers realized that their policyholders were involved with that ugly, scarey stuff called asbestos. The trend turned into an avalanche and has since spread from contractors to architect, engineers, consultants, certified industrial hygenists and even testing laboratories; any one working on the asbestos problem. It is probably only a matter of time before owners of buildings which contain asbestos will experience similar problems. If that happens, many of our buildings will have to be temporarily closed while others will be used while still containing the asbestos hazard much longer than planned. What began as an industry problem is rapidly becoming a very serious social problem.

The insurance industry is not totally at fault in this. Because asbestos abatement is so new, and because asbestos related health problems have latency periods of from five to forty years, no statistical data has been developed which can accurately predict potential liability. Also, underwriters are aware of the miriad of suits against asbestos miners, producers and manufacturers so are unable or unwilling to make a distinction between those who caused the asbestos problem and those who are now trying to solve it. All of this is occurring at a time when falling interest rates have reduced their reserves to a point where they can only underwrite the most desireable coverages. Asbestos related coverage definitely does not fall into the category of most desireable.

To further compound our problem, with all of the regulations and guidelines issued by EPA, OSHA and NIOSH, none has been explicit enough to limit abatement work to truly qualified consultants and contractors and none includes enough teeth to provide the degree of inspection and oversight which would insure state of the art compliance. Consequently, the insurance industry cannot separate the deserving from the fly by night operators. Their response is to cover no one until better mechanisms for qualification and enforcement are in place.

Last year, Congress enacted The Asbestos School Hazard Abatement Act which appropriates money to assist the neediest local education agencies with the most serious asbestos hazards. The Act also requires the states to set up procedures for certifying abatement contractors, which is a giant step in the right direction but gives the states very little assistance in developing those procedures. This means we will have fifty different levels of certification ranging from too stringent to not stringent enough with most falling somewhere in between. This will cause the insurance underwriters and their rewrite markets monumental problems rather than encourage their active participation.

Another provision of the Act has spawned what I feel is a particularly insidious situation. One of the suggested qualifications for state certification of abatement contractors is the need for insurance coverage without spelling out the specific types of coverage intended. Some firms have taken advantage of this requirement by offering insurance policies at windfall prices which give virtually no protection. These policies cost between fifteen and twenty-six percent of the abatement contract price per year of coverage and are on a "claims-made basis", which means they only cover claims made while the policy is in force. In view of the latency period of asbestos related deseases, in my opinion this amounts to legal extortion. It gives school boards and other building owners a false sense of security while placing them in horrendous legal jeopracy. In addition, it siphons off one-fifth to one-fourth of the already scarce resources which are intended to be used to reduce asbestos hazards; not to line opportunistic pockets.

I hope I have convinced you that a problem exists, that the problem is serious and that we need help in solving it.

What kind of help do we need and what can you do? First, we desperatley need better regulations which are very specific and which contain adequate means of oversight and compliance. We also need some means whereby the public and private sectors can jointly solve the problem of adequate liability coverage at an affordable cost and, we need this help now! Every day we delay means another day of unneccesary exposure and many more precious dollars wasted.

If I can be of further assistance please call me at 701-232-2461 (office) or 701-293-5155 or write me at 517 - 21st Street North, Fargo, North Dakota 58102.

Thank you for this opportunity to express my concerns and the concerns of others involved in my industry. I sincerely hope you will see fit to take action and will do so as quickly as possible.

Respectfully,

Glen R Winter

Glen R. Winter

COUNTY SANITATION DISTRICTS
OF LOS ANGELES COUNTY

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CHARLES W. CARRY
Chief Engineer and General Manager

April 1, 1985

Senator Lloyd Bentsen
SH-703 Hart Senate Office Building
Washington, D.C. 20510

Senator Robert T. Stafford
SH-133 Hart Senate Office Building
Washington, D.C. 20510

Gentlemen:

It is my understanding that the Committee on Environment and Public Works is holding a hearing this week regarding insurance related to RCRA and Superfund. More specifically, issues relating to whether insurance for "sudden and accidental" events covering longer term problems will be dealt with. The purpose of this letter is to advise you that, as a result of recent court decisions on liability in these matters, there has been a spinoff effect on wastewater treatment agencies. Insurance companies are now refusing to issue "sudden and accidental" pollution coverage for publicly owned treatment works (POTWs). Heretofore, this type of coverage was used to insure a variety of necessary treatment plant processes, such as chlorination facilities for the disinfection of wastewater prior to its release to the environment, or even accidents in the basic sewer system itself.

Within the last six weeks, the Sanitation Districts contacted 33 insurance companies through our brokers in an attempt to obtain sudden and accidental pollution coverage and not one of them was willing to offer such coverage. I am extremely concerned about the negative impact of this posture by insurance companies on the ability of POTWs to operate and maintain those facilities that have been built to comply with the Clean Water Act.

I would be pleased to furnish additional details to you and would appreciate any consideration that you can give to this matter during your deliberations.

Very truly yours,

Charles W Carry

Charles W. Carry

CWC:iw

National Association of Independent Insurers
2600 RIVER ROAD, DES PLAINES, ILLINOIS 60018-3286
312/297-7800
Lowell R. Beck, President

April 3, 1985

The Honorable Robert T. Stafford
Chairman
Committee on Environment and Public Works
U. S. Senate
SD-410 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing to you on behalf of the member companies of our association which are or have been involved in providing general liability insurance against pollution hazards.

The National Association of Independent Insurers is the nation's largest property and casualty insurance trade association with more than 500 member companies. NAII members write nearly 40% of the property and casualty insurance in force in the United States.

We are concerned that the future ability of our members to provide such insurance has been eroded by a combination of adverse factors.

Fundamentally, the business is in one of the poorest financial conditions in its history. A five year era of competition centering on retention of market share at the expense of sound rating and underwriting practices has come to an end. The return to conservative practices has led to diminished capacity in the primary market, the excess and surplus market and the all important reinsurance market.

With diminished capacity, the industry must employ its assets in areas which give promise of safety and reasonable return.

In adhering to this course, it is imperative that traditional insurance principles be observed.

In order to price its product, the insurer must be able to credibly predict its future liabilities. When entering a contract, it must be able to rely on reasonable stability in the application of legal principles.

Both of these elements are missing in pollution insurance. Court decisions have imposed unforeseen liabilities including strict liability, joint and several liability and retroactive liability.

The liability policy has been broadened far beyond its intent by court decisions which ignore plain language such as "sudden and accidental" and convert the meaning to respond to any unintended result including "gradual" pollution. Policy limits have been pyramided to apply separately to multiple results of a single occurrence. On top of this, huge sums have been required to defend such litigation.

The insurance industry cannot long afford to pay for losses it never contemplated insuring and for which it never collected premium. There is no confidence that the industry will be any better able to predict changing technology, innovative legal concept and societal expectation in the future than it has in the past.

The impact of expanded obligations is not limited to exposures under RCRA and CERCLA but are extended to other areas such as insurance for asbestos abatement contractors and municipalities.

The future of pollution insurance in the private sector appears bleak unless fundamental changes are made. A starting place would be for the Congress to amend CERCLA to eliminate retroactive cleanup liability and to create a statutory climate in which risk bearers have an opportunity to operate under fundamental and traditional insurance principles.

I would appreciate your making my comments a part of the record for your hearing of April 3, 1985.

Sincerely yours,

Lowell P. Beck

Lowell Beck

cc: Committee Members

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April 12, 1985

Hon. Robert T. Stafford
Chairman
Committee on Environment and Public Works
United States Senate
133 SHOB
Washington, D.C. 20510

Re: The National Association of Solvent Recyclers -
Statement on Insurability Problems under CERCLA

Dear Mr. Chairman:

These comments are being submitted to the Senate Committee on Environment and Public Works in connection with the hearings held on April 3, 1985 to gather testimony about the availability of environmental impairment liability insurance.

Our firm represents the National Association of Solvent Recyclers (NASR). Its members include over 50 independent companies which service the spectrum of industries in the United States, including the chemical, coatings, electronic, glass, petrochemical, plastics and steel industries. By beneficially reclaiming spent solvents into specification product, high Btu fuel and feed stock, NASR members are able to often achieve a 100 percent volume reduction of spent solvent wastes. This industry is in the vanguard of waste reduction and recycling technology which offers the most environmentally sensible alternative to waste disposal. Since we are a vital component in the overall national strategy to end unsound waste management practices, we are extremely concerned that the lack of availability of environmental impairment liability coverage will spell a premature end to this most promising of recycling industries.

NASR members are generally small companies which do not have the financial resources to qualify as self-insurers. Consequently, our members rely almost exclusively on the commercial insurance market for coverage which is required as a matter of prudent business judgment and for coverage which is required as a matter of federal and state law. NASR members all face a variety of circumstances which will impair, if not end, the ability of member companies to continue in this business. The circumstances include:

(1) cancellation of existing coverages for environmental risk;

(2) escalation of premiums on the order of four to ten times over the last year; and

(3) insurance coverage with broad exclusions, including exclusions for the cost of governmentally ordered cleanup.

We do not believe that the extent of the collapse of the insurance market needs documentation. *The Wall Street Journal* on March 19, 1985, and *The New York Times* on March 11, 1985, fully describe the extent of the market collapse and confirm what our members have reported to us. Should the Committee wish to have a detailed survey of the availability of insurance to our members we would be glad to provide it upon request.

We believe the cause of this collapse of the insurance market is plain -- the inequitable, unpredictable, unyielding and punitive liability scheme contained in CERCLA. We believe Congress must face up to the fact that while such a stringent liability scheme held some superficial promise of expediting the cleanup of contaminated hazardous waste sites, it has in fact had just the opposite effect. The scheme is so inequitable and capricious in its financial impact on both insured and insurers, that there will inevitably be litigation that will, in many instances, exceed the cost and duration of the cleanup itself.

As long as this situation persists and as long as underwriters and operating companies face the extraordinary uncertainties about their liability exposure under CERCLA for *past* acts, we believe that no adequate commercial insurance market will be available in the future. If Congress permits this condition to prevail, our member companies will probably be unable to obtain commercial insurance as required by law and will be unable to self-insure. Nor will there be a viable specialty recycling industry to provide necessary waste reduction and resource reclamation functions.

We believe the Congress must start by understanding the magnitude and causes of the insurability problem which has been engendered by CERCLA and will consider some of the recommendations for restoring the types of legal principles which might (and there are no assurances that such changes will) restore the commercial insurance market.

We urge your consideration of the attached issue paper which has been prepared by the Association. We regret that NASR was not given the opportunity to testify at the April 3, 1985 hearings on the availability of insurance and we request these comments and the attached issue paper be included in the hearing record.

Sincerely,

Austin P. Olney

Austin P. Olney

Attachment

cc: Curtis A. Moore, Esq.

SUPERFUND AD HOC INDUSTRY COALITION
INSURABILITY ISSUE PAPER

Summary of Problem

Companies engaged in handling hazardous substances should have pollution liability insurance covering off-site property damage and bodily injury. Financial responsibility is dictated by prudent business judgment, by public policy considerations and, in many instances, by law. Laws like CERCLA provide the standard of legal liability for releases, but most often commercial insurance provides compensation to those injured by offsite migration of wastes.

Without a viable insurance market for companies handling hazardous substances, damages associated with offsite property damage and bodily injury may go uncompensated. The magnitude of cleanup costs under CERCLA also threatens to deplete governmental cleanup resources. In addition, the nature of the liability regime under CERCLA threatens to overwhelm private insurance reserves which were never intended to be a means of funding site clean-up costs. The combination of these factors has led to an undermining of the basic objectives of CERCLA -- facilitation of site and release cleanup and recovery of costs from responsible parties.

Background

The estimated cost of remediating the National Priority List sites may exceed $40 billion; the government will seek to recover as much of this as possible from the private sector. Companies in turn will look to insurers for coverage of bodily injury and property damage claims associated with CERCLA cleanup actions -- coverage for liability that is at once retroactive, strict, and joint and several. Not only are traditional defenses unavailable, but liability may be assessed for injury caused by other parties and for conduct that may well have been legal at the time of commission. Such a liability scheme, coupled with escalating cleanup costs and judicial affirmation of this uncompromising liablity scheme, has extinguished the prospects for obtaining meaningful pollution risk insurance.

The disappearance of CERCLA (and RCRA) coverage for companies handling hazardous substances has been greatly exacerbated by the insurance industry's claims exposure under previously issued policies. Prior to 1970, comprehensive general liability (CGL) policies did not have pollution exclusions. Many claims for on-site cleanup coverage are being brought under policies written to cover off-site releases and never intended to cover cleanup of hazardous chemicals.

A similar result has occurred for insurers who excluded pollution risks (for non-sudden, accidental risks) after 1970;

courts, through tortured logic and strained constructions, are now commonly finding coverage for CERCLA claims and cleanups never intended to be insured at the time of issuance. Faced with liability for claims thought to be excluded, and for which premiums were not collected, insurers are so concerned about inadequate reserves for claims under old policies in an unpredictable judicial climate that there is no incentive to write CERCLA coverage for the future. In fact, industry sources report that coverage to meet RCRA requirements for non-sudden, gradual pollution is virtually unavailable. The Insurance Services Office has revised the standard Commercial General Liability contract for 1986 to exclude coverage for both bodily injury and property damage arising from both sudden and non-sudden releases. Coverage for both sudden and gradual off-site releases would be available under a special endorsement, but the standard policy excludes coverage of cleanup costs incurred at the government's direction.

The Dilemma for Operators

Generators, transporters, and treatment, storage and disposal operators require insurance as sound business practice and require insurance to meet portions of their CERCLA and RCRA obligations. The Motor Carrier Act, CERCLA and the Resource Conservation and Recovery Act all contain mandatory financial responsibility requirements, typically ranging from $1 million to $6 million, depending on the applicable regulations, for sudden, accidental releases. The current law and its judicial progeny have almost assured the elimination of commercial insurance for coverage of this risk in the future. Companies producing valuable products and performing essential services cannot insure significant portions of their CERCLA risk.

The Dilemma for the Public

The stringent provisions of CERCLA which were supposed to facilitate cleanup have instead caused complete dislocation of the financial mechanisms (self insurance, primary insurance and excess insurance) normally used by operators to respond to claims for property damage and personal injury. The unavailability of insurance has contributed to making this law unworkable and ineffective in practice, leading to protracted litigation and inequitable allocations of damages.

Recommendations

The very features of CERCLA which were supposed to expedite site remediation -- strict liability, joint and several assessment of damages -- have instead impeded it. What is required is a fair and rational liability regime that looks to culpable parties for cleanup, but restores the elements of fault and proportional assessment of damages, facilitating equitable contribution from responsible parties. Such a system would by no means assure the restoration of an effective insurance market for generators and owners and operators of facilities for offsite coverage. Without such changes, however, the dislocation of the pollution liability insurance market for handlers of hazardous chemicals may become permanent.

Regardless of the future availability of commercial insurance, it is clear that many companies handling chemicals will now be forced to self-insure all or part of their CERCLA risk. Because of joint and several liability, any self-insurer would become an insurer for other companies; one company's self-insured reserves may be used to clean up another company's contaminated site. This possibility will impede prompt and efficient cleanup of sites and spills.

Some of the remedies recommended for creating an equitable and efficient liability regime are set out below:

Past Liability for Clean-Up

- Restore the principle of apportionment of liability based on contribution;
- Limit liability to cleanup costs claimed by the state and federal governments; and
- Utilize an administrative claims procedure to avoid costly litigation.

Prospective Liability for Clean-Up

- Along with apportionment, restore a negligence standard of liability where the defendant has complied with RCRA; and
- Limit the scope of CERCLA coverage to hazardous chemicals cleanup; do not provide additional damages, such as victims compensation.

NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

April 1, 1985

STATEMENT FOR THE RECORD

Committee on Environment and Public Works

The United States Senate

Re: Senate Bill 51 (Superfund Reauthorization Act of 1985) -- Need For A Uniform Standard of Responsibility for Superfund Cleanup Contractors

INTRODUCTION

The National Constructors Association (NCA) appreciates this opportunity to express its views regarding legislation to reauthorize and amend the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund").

The National Constructors Association represents a number of United States firms that are among the most capable in the country of performing remedial cleanup operations at Superfund sites. Our firms have been and continue to be very supportive of Superfund cleanup programs. In the litigious atmosphere that now pervades the United States, however, we are extremely concerned that participation in cleanup activity will lead to imposition of liability without fault even though the cleanup activities are carried out with utmost care in accordance with the requirements of a response action plan which has been approved by the Environmental Protection Agency or the states.

The public policy of this nation requires that a national uniform policy be adopted with respect to the legal standard of liability of those firms whose only connection to the hazardous waste site is the performance of services pursuant to a plan approved by the EPA or by a state. NCA believes that the most sensible remedy is to adopt a national standard of liability based on negligence or based on the particular Superfund contract -- that is, liability should be limited to damages resulting from a release caused by acts or omissions that constitute a breach of a specific provision of the contract. Another possible solution that has been raised is indemnification against all liability of remedial contractors by the EPA. Additionally, a statutory maximum of financial responsibility as well as a rational statute of limitations are necessary to create a reasonable business risk environment so that qualified and responsible contractors can help carry out its purpose of cleaning up the environemnt.

From the contractor's point of view, the unknown, but real, potential of catastrophic and uninsurable liability risks is a major deterrent to engaging in Superfund work. Because of the uncertainty of the various legal standards of responsibility that may be applied to Superfund work and because of the complexity and uncertainties of the scientific and health aspects of handling toxic pollutants, it is impossible to even delineate the true scope of the untoward liability problem facing a remedial contractor.

At present, a kaleidoscope of fifty different sets of state laws governs the standards of liability that may result from Superfund cleanup work. Moreover, the status of individual state law is ever-changing and often varies from case to case. Additionally, the strict, joint and several liability of Superfund itself may possibly be construed to apply to remedial contractors. Clearly, the uncertain and unpredictable status of the law as it may be applied to Superfund cleanup work operates as a strong disincentive for responsible contractors to enter the marketplace of Superfund cleanup, and thus inhibits the original purpose of Superfund -- to alleviate the potential, but substantial, health risks posed by thousands of dumpsites across this country.

The unpredictable liabilities facing cleanup contractors are compounded by and intertwined with the present insurance crisis in the environmental/pollution field. As the Wall Street Journal recently reported, "the pollution-liability insurance field has virtually collapsed."[1] As a result of the tremendous liability risks and the unavailability of insurance coverage, a number of highly-qualified NCA member companies have declined to bid on toxic waste clean-up projects.

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[1] Wall Street Journal, 3/19/85, "Risky Business: Insurers Are Shunning Coverage Of Chemical And Other Pollution", p.1.

This memorandum will discuss the insurance and unlimited, strict liability problems facing remedial contractors as well as suggest approaches which NCA believes will solve these problems.

BACKGROUND AND THE NEED FOR UNIFORM LEGISLATION

A. Superfund Cleanup Work is a National Priority and Problem that Requires a Uniform Approach.

There is perhaps no national environmental problem of more importance to the American people than the management of hazardous waste. Essentially, the problem is two-fold. First, is the need for adequate control and disposal of waste now being generated. Second, is the problem of identifying and cleaning up old and abandoned dump sites.

Recognizing the need for a national and uniform program to regulate the present generation and transportation of waste and to manage disposal sites presently in use, Congress has enacted a broad legislative framework to regulate the generation and disposal of toxic waste on a national level. The Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Solid Waste Disposal Act and other statutes are the foundation for this national regulatory structure.

With the enactment of Superfund in 1980, Congress addressed the more difficult problem of rectifying the legacy of past disposal practices. The extent of this potential threat to our environment is illustrated by the fact that, as of October, 1984, the EPA had designated 786 waste sites for the National Priorities List. Additionally, there are over 15,000 identified sites that are not on the list. Moreover, of the sites currently on the Priorities List, only six have been cleaned up in the first four years of the program.

Clearly, the cleanup of old and abandoned waste sites is a national priority. It is equally clear that the complex difficulties and hazards associated with the removal and subsequent treatment or disposal of these abandoned wastes cannot be accomplished safely without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Thus, any legislative attempt to promote the cleanup of hazardous waste sites must address the closely related problem of the potential, yet real, liability risks that face those firms which undertake Superfund cleanup work. Simply put, the legal standard of liability for a remedial contractor engaged in Superfund work should be uniform and not a patch-work quilt of various standards based on the provisions of different state laws and judicial interpretations in the various state and federal courts. The spectre of an undefined and unending liability is a serious deterrent for responsible contractors who are interested in engaging in cleanup work.

B. Neither the Principle Reasons for the Imposition of Strict Liability Nor the Traditional Factors that Determine Whether an Activity is "Abnormally Dangerous" for Purposes of Applying Strict Liability Apply to Superfund Cleanup Work

The potential application of the doctrine of strict liability to Superfund cleanup work is one of the greatest deterrents to those firms that are interested in Superfund work. Strict liability, as that term is used by our courts, means liability despite the exercise of the utmost care.[2] It is often referred to as liability without fault.[3] The courts of many states have imposed strict liability upon a variety of activities that are considered to be "abnormally dangerous."[4] Although the traditional premises for the imposition of strict liability do not apply to Superfund cleanup work, there is no certainty that remedial contractors will not be swept into the chains of strict liability that may be applied to those persons associated with the creation of the particular hazard that is the subject of cleanup activity.[5] In this connection, it should be noted that the typical Superfund site involves four categories of responsible parties: (1) the generators of the wastes; (2) the persons who transported the waste to the site; (3) the persons who arranged for the transportation to the site and (4) the owners and operators of the site. Each of these responsible classes will remain subject to the full panoply of potential liability theories of the various states.

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[2] See, e.g., Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 517 F. Supp. 314, 317 (N.D. Ill. 1981).

[3] Prosser & Keaton, The Law of Torts §75 at p. 534 (5th Ed. 1984).

[4] See, e.g., Restatement (Second) of Torts §§519 and 520.

[5] See, e.g., National Steel Service Center v. Gibbons, 693 F.2d 817 (8th Cir. 1982); (under Iowa law, doctrine of strict liability for abnormally dangerous activities applied to railroad hauling tank cars loaded with propane even though the railroad acted in conformity with federal and state regulations and without negligence); Chavez v. Southern Pacific Transportation Co., 413 F.Supp. 1203 (E.D. Calif. 1976) (railroad held strictly liable for harm resulting from explosion that occurred while transporting 18 bomb-loaded boxcars under a contract with the Department of Navy).

The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character."[6] In essence, the imposition of strict liability requires a characterization of the activity itself as abnormally dangerous and a public policy decision that one is not free to conduct the particular activity without becoming subject to absolute liability for all harm that ensues regardless of fault.

The principle reasons for the application of strict liability are to assure that the costs of harm resulting from risks inherent in an abnormally hazardous activity be borne by the persons who create such risks and, in some cases, to deter abnormally dangerous activities. Neither of these principles apply to Superfund cleanup work.

The firms which are hired to develop cleanup plans or do the physical work necessary to accomplish cleanup did not create the risk in the first place. Rather, the risk was created by the generators of the substances found at the cleanup site and by those persons associated with the improper disposal. In short, the remedial contractor's role is to alleviate a risk that was created and introduced to the community by others. In essence, the cleanup contractor acts as an instrument of the United States government in carrying out a governmental purpose. There simply is no justification for placing a remedial contractor in the strict chain of liability that applies to those who created the risk.

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[6] Prosser and Keaton, The Law Of Torts §78 at p. 555. (5th Ed. 1984).

Furthermore, the national policy promoted by Congress in the Superfund legislation is to strongly encourage rather than to deter responsible cleanup of hazardous waste. Thus, while standards of strict liability may be appropriate for those who are responsible for creating the hazardous waste site, there is no rational basis for applying such standards to a remedial contractor.

In addition to the fact that the traditional justifications for strict liability do not apply to Superfund work, it is also clear that Superfund work is not an "abnormally dangerous activity" as that term has traditionally been defined for purposes of strict liability. The Restatement of Torts sets forth six factors to be considered in determining if an activity is "abnormally dangerous" before strict liability principles will be applied: (1) the existence of a high degree of risk of harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes.[7] Application of the fifth and sixth factors demonstrate that strict liability should not be applied to Superfund cleanup activity. Clearly, Superfund cleanup activity is appropriate -- in fact, it is managed by the federal government and carried out under the direction and supervision of the EPA and the Corps of Engineers pursuant to a congressional mandate. Similarly, there is no question that the value which the community receives from Superfund cleanup work outweighs any dangerous attributes of the cleanup work.[8]

The National Constructors Association recognizes that some have raised the argument that remedial contractors should be held to a strict liability standard because such a standard will encourage the highest degree of care in the performance of Superfund work. This argument misperceives the nature of strict liability. The essence of the doctrine is that liability is imposed for undertaking the activity, not for the manner in which it is undertaken. Strict liability, therefore, deters the undertaking of the activity. Unlike liability imposed on the basis of a contractual obligation or negligence, it has no impact whatsoever on behavior once the activity is started.

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[7] Restatement (Second) of Torts §520.

[8] Under state law at present, however, each court would make a determination of whether strict liability should be appled to the activities of remedial contractors by analyzing these factors on a case by case basis. Given the general trend toward expanding theories of liability, the remedial contractors' potential liability is extremely unpredictable and virtually impossible to insure against.

Additionally, unlike the persons who are responsible for creating the site in the first place and who are presumably aware of the potentially harmful nature of their hazardous materials and, therefore, of the risks attendant to those materials, the remedial contractor often will not be in a position to weigh the risks inherent in a cleanup job before commencing physical work. This is particularly true with regard to abandoned sites because, more often than not, the remedial contractor will have no way of knowing in advance what he will encounter during cleanup operations. Simply put, there will be no blueprints to tell a remedial contractor what conditions or chemicals or gases are buried underneath the top soil of a hazardous waste dumpsite. No matter how carefully one plans and carries out a cleanup operation, it will be impossible to identify -- let alone, eliminate -- all risks before they are encountered. Thus, while it may be fair to impose strict liability upon those persons who created the problem on the basis that they, at least, were in a position to assess the risks of their enterprise, and they presumably created the risk for their own benefit, the reverse holds true for the remedial contractor who does not have sufficient initial information to assess the various potential risks of bidding on and receiving Superfund cleanup work.

UNAVAILABILITY OF NECESSARY INSURANCE

A. Types of Pollution Insurance

1. "Claims Made" versus "Occurrence"

Insurance policies provide coverage on either a "claims made" or "occurrence" basis. Under the "claims made" basis, the policy provides coverage only for claims which are presented to the insured during the policy's stated period.[9] "Occurrence" insurance provides coverage for injuries caused by events which happen during the policy period, regardless of when the injury is manifested or the claim is presented to the insured.[10] Of course, under either basis, there is no coverage unless the event giving rise to the injury is a covered risk.

"Claims made" insurance is of little value to remedial contractors because separate "claims made" policies must be purchased every year and only cover claims asserted during that period of time. In order to properly bid for a response action contract, a contractor must include its cost of insurance in the bid. Separate "claims made" policies, however, would have to be maintained over a period of years at premium rates which are currently unknown and unpredictable. Indeed, even the future availability of successor insurance to protect the contractor on a "claims made" basis is unknown. "Claims made" insurance, therefore, is inadequate for Superfund cleanup contractors.

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[9] Of course all policies include a cancellation provision, and it is possible that the first claim may trigger the cancellation provision.

[10] See, e.g., Samuel N. Zarpas, Inc. v. Morrow, 215 F.Supp. 887, 888 (D. N.J. 1963).

2. Covered Risks

There are two principal types of insurance which traditionally have been available regarding pollution damage. They are commonly known as the Comprehensive General Liability policy (CGL) and the Environmental Impairment Liability policy (EIL).

The CGL policy is an all-risk policy that provides coverage for unintended accidents generally. The standard CGL policy specifically excludes coverage for damage resulting from the release of pollutants unless the release is "sudden and accidental."[11] Thus, according to the insurance industry, the CGL policy excludes coverage for claims arising from damage that results from gradual leakage or a steady discharge of pollutants. In the past, the CGL policy has been offered on either a claims-made or an occurrence basis.

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[11] The following is typical of the CGL non-sudden pollution exclusion:

> "This insurance does not apply:
>
> To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; provided that this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

EIL insurance was first introduced in 1975. The standard EIL policy provides coverage for nonsudden or gradual releases of pollutants and was designed to complement the CGL policy by affording coverage for nonsudden releases. It contains an exclusion for sudden happenings. The standard EIL policy has been offered only on a claims-made basis.

Six recent court rulings in four states have interpreted the scope of the "sudden and accidental" coverage of the CGL policy to include coverage for non-sudden gradual seeping of hazardous waste into the soil and groundwater.[12] The insurance industry has reacted strongly to the liability it has incurred under these rulings, claiming that such liability was unexpected and not intended and, therefore, not paid for.[13]

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[12] Jackson Township Municipal Utilities Authority v. Hartford Accident and Imdemnity Co., 186 N.J.Super. 156, 451 A.2d 990 (1982); CPS Chemical Co. v. Continental Ins. Co., No. L-039547-81 (Law Div., Essex County, N.J., August 8, 1984), 8 Chem. & Rad. Lit. Reporter. 666, Solvents Recovery Service of New England, Inc. v. Midland Ins. Co., No. 2-025610-83 (Law Div., Union County, N.J. January 9, 1985); Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co., No. 11598 (Ohio Ct.App. 1984), 8 Chem & Rad. Lit. Rptr. 451; Waste Management of Carolinas, Inc. v. Peerless Insurance Co., No. 845 S.C. 97; Riehl v. Travelers Insurance Co., Civil Action No. 83-0085 (W.D.Pa. August 13, 1984), 8 Chem. & Rad. Waste Lit. Rptr. 839.

[13] Contractors with existing coverage under CGL policies containing the standard pollution exclusion language can gain little solace from the case law which has construed that exclusion. Initially, courts in only 6 of the 50 states have interpreted pollution exclusions against insurers. Because these decisions have no precedential authority on the courts of other states, contractors have no assurance whatsoever that their present CGL policies afford coverage in 44 states. In fact, courts in Michigan, New Hampshire, and Wisconsin have ruled that the standard pollution exclusion precludes coverage for non-sudden release of hazardous substances. Great Lakes Container Corp. v. National Union Fire Ins. Co. of Pittsburgh, 727 F.2d 30 (1st Cir. 1984) (applying New Hampshire law); American States Ins. Co. v. Maryland Casualty Co., 587 F.Supp. 1549 (E.D.Mich.

Apparently fearful of the courts' expansive interpretations of their policies[14], insurers have already advised NCA member companies that their CGL policies will contain an exclusion rider for all toxic and hazardous substances when their present policies are renewed.[15] In fact, many insurers have already rewritten their CGL policies to exclude all pollutant releases.[16] Moreover, as the Wall Street Journal recently reported, "the Insurance Services Organization, a body

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1984); City of Milwaukee v. Allied Smelting Corp., 344 N.W.2d 523 (Wis.App. 1983).

[14] We understand that representatives of the insurance industry will testify before this Committee, and we assume that they will provide the Committee with more information in this regard.

[15] The standard CGL policy already contains an exclusion for damage resulting from a release of oil or gas, regardless as to whether the release is sudden or non-sudden. The standard wording of the oil and gas exclusion is as follows:

> "It is agreed that, if with respect to operations described in this endorsement there is a discharge, dispersal, release or escape of oil or other petroleum substance or derivative (including oil or oil mixed with wastes) into or upon any watercourse or body of water, the insurance does not apply to bodily injury or property damage arising out of such discharge, dispersal, release or escape whether or not sudden or accidental."

[16] For example, Travelers Insurance now bars coverage for "damages resulting from any omission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant." The United States District Court for the Western District of Pennsylvania has ruled that this provision excludes coverage for all hazardous waste releases. See Riehl v. Travelers Ins. Co., Civil Action No. 83-0085 (W.D.Pa. August 13, 1984), 8 Chem. & Rad. Waste Lit. Rptr. 839. This case is instructive because Travelers had issued the traditional, standard CGL policy for 1980 through 1982 but removed the "sudden and accidental" exclusion under the policy in 1983, substituting the new language quoted above. The court ruled that coverage existed for the three policies for 1980-82, but held that there was no coverage under the 1983 policy.

that draws up standard forms for the whole industry, is completing a general-liability policy that excludes all pollution and that all insurers expect to be using it by the end of the year."[17]

In addition to the insurance industry's decision to stop writing CGL pollution liability coverage, the EIL insurance market has virtually disappeared within the last six months. Although numerous carriers were writing EIL insurance five years ago, James L. Kimble, senior counsel to the American Insurance Association, has stated

> "Insurers have been faced with a multitude of problems which have resulted in the current unavailability of non-sudden pollution insurance covereage and which may soon result in the unavailability of sudden and accidental coverage.[18]

Mr. Kimble's warning is consistent with The Wall Street Journal in a recent report that

> "[T]he insurers have decided they want no part of the job. In the last few months, the pollution-liability insurance field has virtually collapsed. Rates have climbed 50 percent, 200 percent and even higher. Coverage has been sharply curtailed, with maximums generally reduced to 10 million dollars or less. All but three or four of the 14 companies and pools that issued this kind of insurance have pulled out entirely, including Shand, Morahan and Co. of Evanston, Illinois, which last year claimed 30 to 40 percent of the market."[19]

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[17] Wall Street Journal, 3/19/85, "Risky Business: Insurers Are Shunning Coverage Of Chemical And Other Pollution", p.1, 18.

[18] See letter of James L. Kimble, senior counsel to AIA to the Honorable Robert T. Stafford, March 8, 1985.

[19] Id.

The bleak picture is evidenced by the fact that Evanston Insurance Company/Shand Moranan, the leading insurer, suspended writing new business as of January 15, 1985. Additionally, Gibralter Casualty Co./Dryden & Company, Hartford Insurance Company/Hartford Specialty, Hartford Steam Boiler and International SL/London Brokers all suspended writing new business in 1984. The other major brokers are evaluating their market positions and are not quoting new business at the present. Moreover, some of the existing policies have "completed operation" exclusions which provide that the policy period stops when the operation is completed. These policies are written on a "claims made" basis and are designed for generators and treatment facilities. They are of no use whatsoever to clean up contractors.

The present insurability problem facing cleanup contractors is due, in large measure, to the unpredictable and unending liability concerns engendered by the strict, joint and several liability standard imposed by Superfund and by the likelihood of the imposition of similar liability by state and federal courts. Simply put, the insurance industry believes that its liability exposure is too uncertain to allow it to take a reasonable business risk in this area.

The problem of adequate pollution liability insurance has been recognized by Congress as it has called for studies concerning the availability of pollution insurance protection on reasonable terms. These studies resulted in a March 1982 Treasury Department Report entitled "Hazardous

Substance Liaiblity Insurance." As this Committee is undoubtedly aware, the Treasury report concluded that serious problems exist with respect to insuring pollution risks due to "the particular combination of liability and financial responsibility provisions which tend to render the liability exposure of the insurer too uncertain for traditional underwriting practices."[20]

The situation has not changed since 1982. It has become worse and is illustrated by the following letter that was written by an NCA member company during the first week of March 1985 to a state government regarding the company's decision not to bid work on an inactive hazardous waste site:

> Thank you for considering us qualified to receive the subject RFP. We have carefully reviewed the terms and conditions of the RFP and attended the pre-bid conference but we find, at this time, we are unable to resolve what appears to be an unlimited liability exposure. We must therfore, respectfully decline this opportunity to assist you in this important assignment.
>
> I am sure we all recognize the current concerns in performing toxic and hazardous waste work. Specifically, a participating contractor is exposed to lawsuits, deservedly or not, for real or imaginary reasons, not only during his participation on site but for an unlimited period of time into the future. Given the fact that insurance protection for these risks is becoming essentially unavailable, without the hope of indemnification by the State, a contractor becomes a self-insurer against completely undefined risks.

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[20] Department of the Treasury, Hazardous Substance Liability Insurance at v (March 1982). See generally "The Problem of Unending Liability for Hazardous Waste Management." The Business Lawyer, February 1983, Vol. 38 No. 2, at p. 593-621.

SOLUTIONS TO THE DILEMMA OF UNLIMITED LIABILITY FOR CLEANUP CONTRACTORS

A. National Standard of Liability

A possible amendment to §104 of CERCLA is to exempt a response action contractor from damage claims for a release arising out of work performed pursuant to an approved plan except those damages caused by its own negligence. Such a provision might also provide that, if the contractor would be a responsible party with respect to the site independent of its cleanup work, the strict, joint and several liability of the Act would still apply. An alternative approach would be to exempt cleanup contractors from liability except where damage is caused by a release resulting from their breach of a provision of the cleanup contract or plan. Thus, where a contractor has complied with the contract, it would not be held liable for releases which are, in essence, unavoidable.

The purpose of this national standard of liability is to create an environment which encourages responsible contractors to enter the business of cleaning up hazardous waste. Such a provision will permit contractors to enter into contracts to provide response action with an ability to estimate and control, from the outset, their exposure to damages. It should be pointed out that, even if this provision is adopted, parties injured by releases occurring during response action work would still be entitled to bring a cause of action against those persons designated as liable pursuant to §107(a), such as the owner or operator of the facility, the persons who disposed the hazardous substance at the facility or who transported it there in the first instance. Therefore, liability would be distributed as originally designed by the Act.

In addition, a response action contractor could be held liable for its negligent acts or acts in breach of its contract. The standard of liability would aply to state causes of action as well as actions brought under the Superfund. Once again, the inclusion of a standard of conduct imposed on response action contractors which is under their control will have the desired effect of providing a strong incentive for the work to be performed in a competent and safe manner.

Establishment of a federal standard of liability for Superfund cleanup contractors will be ineffective unless the states and local governments are obliged to follow the standards prescribed by Congress.

There are many areas where Congress has acted to prevent state laws from frustrating the objective of a federal statute. In fact, in a number of areas, Congress has established maximum limitations to be placed on the regulated activity.[21]

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[21] See, e.g., Recreational Vessels, 46 U.S.C. §4306 (". . . a state or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title); Wholesome Meat Act, 21 U.S.C. §678 ("marking, labeling, packaging, or independent requirements in addition to, or different than, those made under this chapter may not be imposed by a State or Territory or the District of Columbia . . ."); Petroleum Marketing Practices Act, 15 U.S.C. §2806

And, with regard to atomic weapons testing contractors, the last session of Congress enacted legislation which mandates that all claims against such contractors are claims against the federal government under the Federal Tort Claims Act.[22] As the United States Supreme Court has stated, "statutes limiting liability are relatively commonplace and have been consistently enforced by the courts."[23] Clearly, a limitation of liability provision for Superfund contractors is necessary to remove the present economic impediments that are discouraging private industry participation.

B. Adoption of a Limit on Liability and Statute of Limitations

Whatever the standard of care, the liability of remedial contractors should not be disproportionate to the compensation such contractors will receive from their cleanup activities, or financially responsible contractors will be deterred from participation in the cleanup. In addition, a limit on the remedial contractors' liability is essential if there is to be any substantial hope of obtaining insurance covering the liability. At present, with the array of potential causes of action available under state and federal law, liability is limitless. Responsible contractors are discouraged from entering

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(establishes sole criteria for termination of franchise relationship).

[22] Omnibus Defense Authorization Act, 1985, Pub. L. No. 98-525, §1631 (98th Cong., 2d Session).

[23] Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 89, 98 S. Ct. 2620, 2638 n.32 (upholding constitutionality of the liability limitation provision in the Price-Anderson Act for operators of private nuclear power plants).

into cleanup operations because of the possibility that they will be exposed to risk beyond the available insurance limits, even if a national standard of liability were adopted. The financial integrity of substantial companies could be jeopardized. In order to remedy this dilemma, NCA suggests that there be established an upper limit on liability which bears a reasonable relationship to the estimated cost of remedial action.

Contractors are also subject to undue exposure and deterrence because of the long period of time which may lapse between their performance of work and the manifestation of harm from a non-sudden release. The insurance industry has stated that, if pollution insurance is made available in the future, it will be offered on a "claims made" basis only. "Claims made" insurance, in order to fully protect a contractor, will have to be maintained for 20-30 years. Contractors bidding on hazardous waste cleanup projects in the present have no way of calculating into their bids the cost of pollution insurance many years from now. Indeed, they have no assurance that insurance coverage will be available at all in future years. In order to reduce the deterrent to cleaning up the environment that this risk presents, and to ensure consistency among the states, NCA suggests that Congress should consider the possibility of a statute of limitations for claims against remedial contractors.

C. Indemnification of Contractors

Another alternative is an indemnification provision which requires the EPA to hold harmless, defend and indemnify a response action contractor against claims arising out of the performance of work under a cleanup agreement coupled with a limitation of liability and statute of limitations as discussed above. Such an indemnity would not apply, however, if the contractor is found to have caused the damage by its negligence.

An indemnity provision is consistent with the underlying purposes of the Act. Responsible contractors would be encouraged to enter into contracts to clean up hazardous substances because they would be protected against the spectre of the imposition of limitless liability without fault. Injuries caused by the release of hazardous substances would be redressed and the cost of reimbursement would be spread among the population by virtue of having been paid for by the fund. Finally, a response action contractor would be required to act responsibly in order to meet the statutory standard depriving it of indemnification in the event that it is negligent.

D. Federal Tort Claims Act Remedy

Another possible solution to the dilemma is to convert a claim against a remedial contractor for damages caused by activities carried out pursuant to an approved plan into a Federal Tort Claim action against the U.S. government. Such a proposal could further provide that the government would have a right of subrogation, up to a maximum statutory limit, against the cleanup contractor where the damage was caused by its negligence. This remedy is consistent with the fact that remedial contractors are carrying out a major governmental function in cleaning up the environment. Furthermore, injured parties would be compensated but the liability of contractors would not be so severe as to create an impediment to cleaning up the environment.

CONCLUSION

As stated at the outset, NCA companies are strongly supportive of the Superfund policies and wish to participate in cleanup contracts. The liability provisions of the Act and of state law, however, coupled with the bleak insurance picture, have created a climate in which there is a strong disincentive for financially responsible contractors to enter into contracts to clean up hazardous waste.

NCA urges Congress to enact legislation encompassing reasonable limits on the potential liability of cleanup contractors. Such legislation will permit contractors to proceed with cleanup contracts on the same basis on which they perform other contracts, being held liable for their own conduct, but without the prospect of incalculable and potentially devastating liability which is beyond their control. Reasonable limitations on liability will thus encourage NCA members and other responsible contractors to proceed with the vital national enterprise of cleaning up the environment.

Respectfully submitted,

NATIONAL CONSTRUCTORS
ASSOCIATION

New England Fuel Institute

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STATEMENT
of the
NEW ENGLAND FUEL INSTITUTE
concerning
ENVIRONMENTAL LIABILITY INSURANCE
before the
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

WASHINGTON, D.C.
APRIL 3, 1985

The New England Fuel Institute ("NEFI") hereby submits comments to the Senate Committee on Environment and Public Works regarding the increasingly difficult accessibility and affordability of environmental liability insurance for petroleum storage tanks. In addition, NEFI hereby submits its proposals for a mechanism to assure continued access to environmental liability insurance by petroleum marketers.

NEFI is an association of 1,064 independent retail and wholesale home heating oil marketers who sell petroleum products throughout the six New England states. NEFI members own no refineries, pipelines or production facilities. They are primarily small, independent local businessmen serving the energy needs of their communities.

Petroleum marketers are experiencing extreme difficulties in obtaining and retaining environmental liability insurance for their petroleum storage tanks. NEFI receives calls practically every day from members who find that, upon attempting to renew their policies, coverage is being denied because the carrier will no longer write such insurance, or else the cost of the premiums is prohibitive. If this trend continues, NEFI members, small independent petroleum product marketers, will be unable to purchase insurance coverage for their tanks. The absence of affordable environmental liability insurance threatens the viability of the entire home heating oil distribution system. In addition, it threatens the loss of heating oil storage in underground tanks which is necessary to the region's energy security. Heating oil dealers are small businessmen; an uninsured environmental loss could easily wipe out most dealers. These small dealers must have available appropriate insurance coverage.

Another problem for heating oil dealers is that fuel oil risks, which are environmentally minimal, are being classified with both chemicals and gasoline. The risk posed by chemicals is the most severe. Most chemicals cannot be detected easily by smell and taste. Gasoline, while easily detectible by smell and taste, migrates quickly into ground water. Further, it contains toxic and carcinogenic chemicals harmful to human health and the environment.

Fuel oil, however, poses no such problems. It does not migrate quickly into ground water and it can be easily detected by taste and smell. It contains no toxins or carcinogens. Further, the number of serious enviromental problems directly attributable to fuel oil storage tanks is minimal.

Congress and the Environmental Protection Agency ("EPA") must focus on a mechanism to make certain that environmental liability insurance for petroleum products marketers and specifically for fuel oil tanks remains economically available. To that end, NEFI respectfully offers the following legislative recommendations for the Congress' immediate consideration.

I. Petroleum Exclusion

The Comprehensive Environmental Response Liability and Compensation Act ("CERLCA" or "Superfund") specifically exempts petroleum from the definition of hazardous substances.1/ Although petroleum leaks are thereby excluded from Superfund liability, underground tanks are regulated under the Resource Conservation and Recovery Act.2/ Fuel oil leaks are quickly detected because of taste and smell and are relatively easy and inexpensive to clean up; liability from such a leak would be limited to property damage. Therefore, it is important to retain the petroleum exclusion, and focus Superfund's clean-up efforts on chemicals and other hazardous substances. However, should Congress modify the petroleum exclusion, parties responsible for a petroleum leak would be subject to strict Superfund liability. This change would further reduce the present limited availability of environmental liability insurance that now exists for petroleum storage tanks.

II. Government Assistance

A. Background

In many areas, the United States government has assisted the insurance industry in providing critically needed insurance coverage. Some examples of this assistance are: the Federal Deposit Insurance Corporation ("FDIC"), which insures

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1/ PL 96-510 §101(a)(14).

2/ PL 98-616.

depositors' savings against bank failures; the Federal Crop Insurance Program, which insurers farmers from the economic disaster of crop failures; the Overseas Private Investment Corporation ("OPIC"), which established a government-operated corporation to, among other things, insure and/or reinsure exports and other foreign business investments by U.S. companies from political risks overseas; and the National Flood Insurance Program ("NFIP") which provides insurance for rebuilding flood damaged areas.

Accordingly, when the private insurance industry was unable to bear the full burden of insuring losses in areas affected by the public interest, the federal government has provided assistance. The assistance has made it possible for individuals and small businesses to insure against damages caused by weather, unstable markets, bank failures and floods. The area of environmental liability insurance for petroleum marketers is similar to these areas: this insurance coverage is expensive, difficult to obtain and essential to the public interest in maintaining a competitive petroleum marketing sector. Therefore, NEFI recommends the establishment of a federal program to assist parties in obtaining adequate insurance coverage for environmental liability damage and suggests that this new program be modelled on the National Flood Insurance Program.

B. National Flood Insurance Association

In 1968, Congress addressed the problem of continually being forced to provide disaster relief to areas plagued by floods. Disaster relief had become more expensive because the cost of building and rebuilding had increased. Moreover, recipients often used the money to rebuild in the very areas that were just flooded; the areas were often flooded again after the rebuilding.

Congress therefore developed the NFIP (42 USC §4011). The NFIP was designed to (1) provide flood insurance and (2) insure that all rebuilding of flood damaged property is done in a manner to minimize future risks of flood damage.

Under the NFIP, administered by Federal Emergency Management Agency ("FEMA") the federal government acts as a reinsurer to private insurance carriers. The private companies write the policies, collect the premiums and pay the claims. These companies retain approximately 32 percent of the premiums collected. The remainder goes to the government. If claims equal or exceed the margin provided to the private companies, the government pays the additional sums.

Under the NFIP, only communities with flood plain management are entitled to participate. If these communities are flooded and damages paid, rebuilding must be done above the flood plane or in some manner so that new structures will not be damaged in another flood. Thus, flood insurance claims are generally paid only once; on the other hand, disaster relief can happen again and again.

C. NEFI Recommendations

NEFI believes that a similar type of program should be considered for petroleum product marketers' environmental liability insurance.

A small financial and administrative investment by the government in such environmental liability insurance or reinsurance could save many small business marketers from economic ruin and at the same time, minimize possible future outlays for the cleanup of environmental disasters caused unwittingly by parties unable to obtain proper insurance.

A program of proper maintenance could also be established, and monitored by insurance companies working in conjunction with the federal government. Insurance companies, the parties best able to determine the level of risk posed by different substances and proper handling methods, would be able to provide coverage and offer economic incentives for safe management of petroleum products.

III. CONCLUSIONS

NEFI is concerned that the high cost and inaccessibility of environmental liability insurance might force responsible businessmen to do without liability insurance, and thereby risk financial ruin in the event of a serious leak.

NEFI knows that securing environmental liability insurance for petroleum product storage tanks is becoming increasingly expensive and difficult. As a result of this situation, the Institute recommends the establishment of a federal program to assist private insurance companies to provide necessary coverage for petroleum product marketers.

Statement of John M. Toups, Chairman and President, on Behalf of Planning Research Corporation, on Remedial Engineering Liability and Insurance Issues for Superfund, Before the Committee on Environment and Public Works, United States Senate, Washington, D.C.

Mr. Chairman and Members of the Committee:

Planning Research Corporation appreciates the opportunity to present its views on remedial engineering liability and insurance issues arising out of the implementation of the Comprehensive Environmental Response, Compensation and Liability Act. PRC is a multidisciplinary scientific and engineering consulting firm emphasizing environmental engineering and offering services in civil, sanitary, geotechnical, hydrological, mechanical and electrical engineering areas. It is a consultant to the United States Environmental Protection Agency on enforcement related technical services for hazardous waste problems under the "TES 2" (Technical Enforcement Support) contract.

PRC's role is professionally satisfying and offers us the opportunity to contribute as both individual and corporate citizens to solving one of America's most pressing environmental and social problems, of which this committee is well aware. Congress has made a major commitment to contain, treat, and properly dispose of hazardous waste through CERCLA. The proposed legislation before this committee in the form of S.51 would strengthen and extend this commitment.

PRC and, I'm sure, other engineering and consulting firms are prepared to invest the time and economic resources to properly discharge its responsibility. Finding solutions for properly treating or disposing of hazardous waste, however, is not an exact science. The engineer's role is to objectively prepare the best alternatives to individual waste site problems for presentation to federal and state agencies for a decision. In discharging our role, it goes without saying that we will provide the best technical and professional expertise that we can.

However, because of the highly technical and often hazardous nature of the problem and our duty to the public, our employees and shareholders, as well as the law, PRC must insure against unintended and unforeseen mistakes if it is going to be able to participate in the hazardous waste cleanup market. This statement is directed to the problems we have encountered in attempting to obtain necessary insurance.

So far during 1985, under its consulting agreement with the Environmental Protection Agency, PRC has been assigned a series of short-term and presumably relatively low risk tasks relating to specific sites. PRC has been fortunate to obtain both general liability and professional liability coverage for these tasks through mid-1985. We have embarked on an effort to obtain coverage for the services that we will be performing in the latter half of 1985 and beyond. In pursuing this objective, we are encountering serious difficulties as follows:

First, the insurance industry is converting general liability coverage from an "occurrence" to a "claims-made" basis. Professional liability insurance is already being issued on the more restrictive claims-made basis.

Second, PRC is finding that it is extremely difficult to obtain general liability and professional liability insurance for environmental pollution. Coverage for the latter half of 1985 and beyond does not appear to be available at this time. We have been unable to obtain pollution coverage to date, though we have been actively pursuing insurance companies.

Indeed, it is becoming increasingly difficult to obtain professional liability coverage at all. Many insurance companies have dropped out of the professional liability market and are no longer offering this type of coverage. In addition, those companies that are still selling such coverage are offering lower limits and greater number and more extensive exclusions at substantially higher premiums.

Of great concern to us is the fact that our insurance carriers are requiring us to increase our "self-insurance" or deductible from an already high level to an extraordinary level in excess of five million dollars. Obviously there is no profit margin in PRC's TES 2 contract which could even remotely compensate the corporation for the size of this uninsurable risk. Self-insurance was certainly not anticipated at the time we entered into the TES 2 contract.

No better evidence of the difficulty we, and other engineering and consulting companies, face exists than the environmental pollution exclusions recently issued by London insurance underwriters who set the trend for the insurance market. A copy of these exclusions is attached to this statement and we ask that it be made a part of the record. The exclusion contained on page 2 would mean no coverage for environmental pollution related activities in general, and for any activities on behalf of the public and the Environmental Protection Agency in assisting with the implementation of the Superfund program (such as under PRC's TES 2 contract), in particular.

At present, and with the information now in our possession, we have no expectation that we will be able to obtain satisfactory, general liability or professional liability insurance coverage for work related to hazardous waste and Superfund clean-up activities after mid-1985. From our experience with the insurance industry and the information which has come to our attention, we believe that this situation will confront most engineering and consulting firms who wish to undertake hazardous waste contracting activities.

The impact of the insurance industry's extreme reluctance to provide such coverage for the timely and successful implementation of CERCLA is, I am sure, apparent. From our experience, we believe this situation exists for the following reasons:

- First, the insurance market is undergoing an overall tightening of coverage which will restrict underwriting in many professional engineering fields, including hazardous waste. Price competition impelled the insurance industry to underwrite coverage for many years at rates which did not cover losses, let alone provide a profit. The insurance industry counted on high investment interest rates to make up for low premium charges. With the decrease in interest rates they have been financially hurt. The reinsurance market, for instance, has presently less than one-half the capacity than it did in 1984 because of essentially poor underwriting practices.

- Second, the hazardous waste cleanup business is a new, technically complex and high risk activity with which insurance companies have had little experience. What experience they have had has been complicated by court decisions which have required insurers to defend insured parties and to pay out massive claims for environmental pollution problems not anticipated by the underwriters. The potential for unanticipated obligations can only increase with the application of strict joint and several liability under Superfund.

- Third, the insurance industry has not had sufficient experience to assess the risk for hazardous waste site operators, let alone engineering consultants acting as response action contractors. Its inability to assess the risk is aggravated by the factors indicated above.

The future availability of environmental pollution insurance can be described as uncertain at best and nonexistent at worst. I'm sure the Committee is aware of the Wall Street Journal article of March 19, 1985, which reported that insurers now are "shunning pollution of all kinds - fast, slow, accidental, deliberate."

The key consideration for the Government, and appropriately the Congress, is whether the unavailability of environmental pollution insurance will adversely impact and substantially delay the vital Superfund program. Is there a sufficient number of qualified and experienced engineering firms which will nonetheless undertake the work without insurance coverage at any level? Is there likely to be an adequate number of firms bidding on the substantially increased number of contract offerings anticipated as this program matures?

The structure of the architect and engineering design industry may be such that in the short term in a highly competitive market there may be a sufficient number of firms willing to bid for work regardless of the unavailability of insurance. We believe however, that this current state of the engineering market is not conducive to the federal government obtaining qualified scientific and technical expertise to carry out its Superfund mandate. Engineering firms normally have few assets and low net worths. Firms, even highly competent ones, which suffer limited losses cannot remain in business for long without adequate risk coverage. This is a fact of business life which every industry encounters, but is especially true of the high-risk and technically complex hazardous waste cleanup business.

The importance of insurance and indemnification is clearly illustrated by the fact that states require cleanup contractors to insure against, and, in some case, to indemnify the state against liability arising out of the contractor's activities. Contractors must be able to provide such insurance and indemnity if they are to continue serving the states. However, the unavailability of insurance, coupled with EPA's failure to indemnify state contractors, leaves the contractor with no choice but to "self-insure," an option which few if any firms have the resources to utilize.

Further, the federal government, state and local governments and the public are not well served by the inability of scientific and engineering consultants to provide adequate compensation through insurance or indemnification programs for direct injuries due to negligence and mistakes incurred while serving the public interest. Spreading the risk has been the principal vehicle for protecting directly injured parties since inception of modern tort law. Certainly this principle should extend to the activities of response action contractors.

The largest and often most experienced firms with the greatest degree of knowledge and sophistication will be those who first perceive the untenable nature of these risks. It will be these companies which will leave the marketplace initially, with other less experienced and often smaller companies remaining to compete for the work. In an area where public safety must be paramount, it is in the national interest to have difficult and dangerous tasks performed by the most qualified entities. Similarly, it is in the public interest to have these same tasks performed by companies which are in a position to be financially responsible to the public in the event that injuries or illnesses result from inadvertent mistakes or negligence.

In recognition of these principles, therefore, we recommend that the committee adopt legislation which would accomplish the following:

First, architecture and engineering consulting firms which assist federal, state and local governments in the cleanup process should not be held responsible for contamination caused by careless disposal of hazardous waste. Their activities are in furtherance of solutions, not problems. As such they should be removed from the chain of strict, joint and several liability imposed upon responsible parties by CERCLA for all past, present and future releases of hazardous substances, pollutants or contaminants from a site. It could be argued that CERCLA already provides such an exemption. We recommend that this be clarified through a specific exemption for response and remedial action contractors as contained in legislation approved by the House of Representatives in 1984.

Second, an equal and perhaps greater threat to response action contractors is the inability to insure against negligent acts and mistakes for which recovery may be sought under state law and perhaps other federal law as discussed above. Our concern is for the parties directly injured by the unintended, negligent acts of response action contractors. An example of this perhaps would be the injury to a farmer or farmers suffering the loss of several hundred head of cattle killed when a contractor drills into a buried waste site as part of an exploration study and unintentionally causes a releases of a hazardous substance. The farmer in this situation has suffered a direct loss due to the unintended act of a response action contractor. The same event may cause serious illness to the farmer's family or even to the employees of other contractors working on the same site.

The insurance industry should be given the opportunity to provide insurance to response action contractors through the marketplace to cover such acts. If such coverage is not forthcoming, the government must become the insurer or indemnifier of last resort for either primary or excess coverage.

We therefore propose that the EPA Administrator be directed to hold harmless, defend and indemnify remedial and response action contractors against claims under Federal or state law not covered by insurance relating to any action authorized under CERCLA, including but not limited to a response or remedial action plan approved by the Administrator or a state. Such indemnification should not extend to gross negligence or intentional misconduct, but rather should cover negligence and errors and omissions.

Further, the Congress should provide a tiered approach which would establish private insurance liability ceilings on a per site basis, in order to provide some predictability for the writing of policies and the development of a premium structure. Above that ceiling or cap, if reached in a site-specific case, the government should become the insurer or indemnitor of last resort for either primary or excess coverage. The government indemnification could be funded, for example, by a set-aside, perhaps in the range of 2-5 percent of the Superfund authorization. By limiting the set-aside to a small percentage there should be no reduction in funds available for cleanup activities, nor will there be any drain on the Treasury.

The requirement that indemnification be provided to all remedial and response action contractors, with the designation of a specific portion of Superfund for this purpose, provides more reliable protection than is currently available or likely to become available from the insurance market for parties directly injured by cleanup activities such as contractor employees and the directly affected public.

This approach is similar to the role the federal government has played in other high risk ventures such as space exploration, development in flood plains and dam safety. It is a reasonable approach which relies on the marketplace initially, and the federal government only as a last resort.

By providing some limited security to response action contractors, this approach enables the most experienced and prudent of contractors to offer services needed for cleaning up hazardous waste sites. Absent such protection we believe only the less experienced, risk-taking engineering firms which lack the ability to be responsible for the losses to which they may contribute will bid on such work.

Finally and most importantly, this approach provides protection to parties directly injured by negligence of response action contractors. Without it, protection will be extremely limited or nonexistent.

ATTACHMENT

[London underwriters pollution endorsements]

(1) IT IS HEREBY UNDERSTOOD AND AGREED THAT WITH EFFECT FROM THE INCEPTION DATE OF THIS POLICY WHERE THE NAMED ASSURED HAS KNOWLEDGE AS AT OR PRIOR TO THE INCEPTION DATE OF ANY ANNUAL POLICY PERIOD HEREON WITH REGARD TO ANY CLAIMS, SITUATIONS OR CIRCUMSTANCES WHICH HAVE ARISEN AND OR OCCURRED IN THE PAST OR WHICH MAY ARISE AND OR OCCUR IN THE FUTURE WITH RESPECT TO SEEPAGE, POLLUTION AND/OR CONTAMINATION FROM:-

(A) ANY LAND AND/OR WATER SITE AND/OR FACILITY OWNED, LEASED AND/OR OPERATED BY THE ASSURED AND USED FOR THE DISPOSAL AND/OR DUMPING OF INDUSTRIAL WASTE MATERIALS.

(B) ANY OPERATION PROVIDED BY AND/OR ON BEHALF OF THE ASSURED FOR THE DISPOSAL, DUMPING AND/OR REMOVAL OF INDUSTRIAL WASTE MATERIALS.

THIS POLICY WILL NOT COVER WITH RESPECT TO OPERATIONS DESCRIBED IN (A) AND (B) ABOVE:

(1) PERSONAL INJURY OR BODILY INJURY OR LOSS OF, DAMAGE TO OR LOSS OS USE OF PROPERTY DIRECTLY OR INDIRECTLY CAUSED BY SEEPAGE, POLLUTION OR CONTAMINATION.

(2) THE COST OF REMOVING, NULLIFYING OR CLEANING-UP SEEPING, POLLUTING OR CONTAMINATING SUBSTANCES.

(3) FINES, PENALTIES, PUNITIVE OR EXEMPLARY DAMAGES WITH RESPECT TO (1) AND (2) ABOVE.

(4) ANY COST OR EXPENSE ASSOCIATED WITH (1) (2) OR (3) ABOVE.

2, ABSOLUTE POLLUTION EXCLUSION:

INDUSTRIES, SEEPAGE, POLLUTION AND CONTAMINATION EXCLUSION CLAUSE NO. 4

THIS INSURANCE DOES NOT COVER ANY LIABILITY FOR:

(1) PERSONAL INJURY OR BODILY INJURY OF LOSS OF, DAMAGE TO OR LOSS OF USE OF PROPERTY DIRECTLY OR INDIRECTLY CAUSED BY SEEPAGE, POLLUTION OR CONTAMINATION.

(2) THE COST OF REMOVING, NULLIFYING OR CLEANING-UP SEEPING, POLLUTING OR CONTAMINATING SUBSTANCES.

(3) FINES, PENALTIES, PUNITIVE OR EXEMPLARY DAMAGES

POSSIBLE NAMED PERILS BUYBACK:

NOTWITHSTANDING THE ABSOLUTE SEEPAGE AND POLLUTION EXCLUSION ATTACHED TO THIS POLICY, THIS POLICY WILL APPLY TO:

1) PERSONAL INJURY OR BODILY INJURY OR LOSS OF, DAMAGE TO OR LOSS OF USE OF PROPERTY DIRECTLY OR INDIRECTLY CAUSED BY SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION OF AIR, LAND OR WATER.

2) THE COST OF EVALUATING AND/OR MONITORING AND/OR REMOVING AND/OR NULLIFYING AND/OR CLEANING-UP SEEPING AND/OR POLLUTING AND/OR CONTAMINATING SUBSTANCES.

BUT ONLY AS A RESULT OF:-

(A) UNINTENDED FIRE, LIGHTNING OR EXPLOSION OR

(B) ANY ACCIDENT INVOLVING A ROAD VEHICLE

HAPPENING DURING THE PERIOD OF THIS POLICY.

NOTHING CONTAINED IN THIS ENDORSEMENT SHALL OPERATE TO PROVIDE ANY COVERAGE WITH RESPECT TO:

NOTWITHSTANDING THE ABSOLUTE SEEPAGE AND POLLUTION EXCLUSION ATTACHED TO THIS POLICY, THIS POLICY WILL APPLY TO:

1) PERSONAL INJURY OR BODILY INJURY OR LOSS OF, DAMAGE TO OR LOSS OF USE OF PROPERTY DIRECTLY OR INDIRECTLY CAUSED BY SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION OF AIR, LAND OR WATER.

2) THE COST OF EVALUATING AND/OR MONITORING AND/OR REMOVING AND/OR NULLIFYING AND/OR CLEANING-UP SEEPING AND/OR POLLUTING AND/OR CONTAMINATING SUBSTANCES.

BUT ONLY AS A RESULT OF:-

(A) UNINTENDED FIRE, LIGHTNING OR EXPLOSION OR

(B) ANY ACCIDENT INVOLVING A ROAD VEHICLE

HAPPENING DURING THE PERIOD OF THIS POLICY.

NOTHING CONTAINED IN THIS ENDORSEMENT SHALL OPERATE TO PROVIDE ANY COVERAGE WITH RESPECT TO:

1) LOSS OF, DAMAGE TO OR LOSS OF USE OF PROPERTY DIRECTLY OR INDIRECTLY RESULTING FROM SUBSIDENCE CAUSED BY SUB SURFACE OPERATIONS OF THE ASSURED.

2) REMOVAL OF, LOSS OF OR DAMAGE TO SUB-SURFACE OIL, GAS OR ANY OTHER SUBSTANCE:

3) FINES, PENALTIES, PUNITIVE DAMAGES, EXEMPLARY DAMAGES, TREBLE DAMAGES OR ANY OTHER DAMAGES RESULTING FROM THE MULTIPLICATION OF COMPENSATORY DAMAGES:

4) ANY SITE OR LOCATION USED IN WHOLE OR IN PART FOR THE HANDLING, PROCESSING, TREATMENT, STORAGE, DISPOSAL OR DUMPING OF ANY WASTE MATERIALS OR SUBSTANCES OR THE TRANSPORTATION OF ANY WASTE MATERIALS OR SUBSTANCES.

STATEMENT OF
REINSURANCE ASSOCIATION OF AMERICA
BEFORE THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

April 3, 1985

The Reinsurance Association of America (RAA) would like to provide the U. S. reinsurance industry's perspective on the environmental liability problem and its impact on the insurability of future pollution risks. We had earlier expressed our endorsement of the American Insurance Association's (AIA) statement presenting the primary insurance industry's views and have discussed the issue with our reinsurance underwriters and claims persons to learn more about our industry's special problems. We drew on the underwriting and claims expertise of our member companies to prepare this statement and hope that it will help guide the Committee in its further consideration of environmental legislation.

The RAA is the leading representative of the U. S. property and casualty reinsurance industry. Our 24 members are professional reinsurers and provide reinsurance capacity to primary and excess insurers writing the comprehensive general liability and special pollution coverage. Our members are greatly impacted by the environmental laws, particularly Superfund, and those judicial decisions imposing liability under statutory and common law as well as insurance policy interpretations. Although we share the concerns expressed by the primary insurance industry, our members experience additional problems from environmental liability that impact further the reinsurance industry's ability to provide this protection, and we will concentrate on that experience for this statement.

REINSURANCE IS A DISTINCT INSURANCE MECHANISM THAT ALLOWS PRIMARY INSURERS TO SPREAD ENVIRONMENTAL RISKS IN MANY WAYS

Reinsurance is essentially an insurance transaction whereby the reinsurer, for a premium, agrees to indemnify the ceding insurer or reinsured against all or part of the loss which the latter may sustain under its policies of insurance. It is often described as the insurance of insurance companies because it provides reimbursement for the insurer's losses under policies covered by the reinsurance contract. Reinsurance is purchased by the primary or excess ceding insurer for its own benefit so that it can spread its risks and limit its own liability from large or catastrophic losses. The usual reinsurance contract does not involve the policyholder, who looks only to its insurer for defense and indemnity against loss.

Reinsurance was developed to provide U. S. and international capacity essential to the continued growth of the direct insurance industry. In addition to capacity, reinsurance is purchased by a primary insurer to (1) reduce exposure to liability on particular risks, (2) protect against accumulations of losses arising out of catastrophies, (3) reduce total liabilities to a level appropriate to its premium volume and capital, (4) reduce exposure to certain and possibly more hazardous lines of business or alter its "mix" of business, (5) help stabilize operating results, and (6) obtain assistance with new concepts and lines of insurance.

Reinsurance contracts are shaped to meet the specific needs of the ceding insurer, and this freedom of contract is one of the basic tenets of the reinsurance industry. Despite the fact that there are no standard reinsurance contracts, there are two basic types which are used and adapted to accommodate the buyer's business. A reinsurance treaty is a broad and often automatic agreement that covers some portion of a particular class or classes of business, i.e., the ceding insurer's entire workers' compensation on property book of business. In contrast, a facultative agreement covers a specific risk of the ceding insurer and requires the insurer and reinsurer to agree on terms and conditions on a contract-by-contract basis. Both treaties and facultative agreements may be based on a pro-rata distribution where the two parties share proportionately in premiums and losses. The agreements may also be written on an excess basis, where only the losses of the insurer in excess of a predetermined amount, known as the "retention", are reinsured. It must also be noted that many reinsurers also provide direct excess insurance to policyholders, although this direct business generally represents a small portion of a professional reinsurer's entire book of business.

The 1983 U. S. property and casualty reinsurance market received approximately $10.9 billion in written premium, representing just 10% of the total net premium written by all property and casualty companies. However, the reinsurance industry absorbs a higher percentage of total losses, and this tremendous liability requires a further spread of risk to international markets. Foreign reinsurers assume a significant portion of these U. S. risks and, indeed, U. S. insurers paid $1.6 billion more in reinsurance premiums abroad than were received by U. S. reinsurers from foreign ceding companies. Much of this premium going abroad is paid by U. S. reinsurers to spread their own risks, and these contracts are called "retrocessions".

These aspects of the reinsurance business--particularly indemnification, different types of exposures, and relatively low percentage of total premiums compared to greater percentage of ultimate liability--have major implications in the environmental liability insurance area.

REINSURANCE INDUSTRY SHARES ALL ENVIRONMENTAL LIABILITY PROBLEMS EXPERIENCED BY PRIMARY INSURANCE INDUSTRY IN ADDITION TO ITS OWN

Since reinsurers indemnify the primary and excess insurers for losses paid under their direct policies, they are impacted by the same legal and legislative developments identified by the AIA in its statement. Any factors increasing the frequency or amount of pollution losses will increase the reinsurers' liability, although the effect is even more dramatic. Therefore, the reinsurance industry shares the same serious concerns over past liability for pollution and the industry's ability to meet the growing demands for future insurance of environmental risks.

The RAA will not duplicate the AIA's fair representation of all the problems facing the entire insurance industry, except to emphasize a cause-and-effect factor that appears to receive little acceptance in the regulator community. The insurance industry's enormous and still expanding liability for pollution under past general liability policies will preclude it from providing sufficient coverage for future pollution risks. The "past" experience cannot be separated from the future because these "past" policies are creating present and future liabilities of such magnitude and unpredictable nature that the industry cannot assess its total responsibility. Insurance policies written in the 1950's and 60's for relatively low premiums must now respond, pursuant to court decisions and a retroactive Superfund law, to gradual pollution liability and hazardous waste site clean-up demands.

The impact on future insurance is two-fold. First, these liabilities as well as other losses are draining the industry's policyholder surplus and hence its ability to provide capacity needed in all lines of insurance ranging from homeowner's to asbestos removal contractors' coverage. Second, these losses have highlighted the totally unpredictable nature of the risk and liability which can be created as well as enlarged by the courts and legislatures. Taken together, the insurance industry will probably avoid risks it cannot understand, rate or limit with any certainty and commit most of its available capacity to lines providing some profit potential. An insurer will adopt this behavior if it wants to remain solvent and profitable, and it must do so for the benefit of all its policyholders and shareholders.

ADDITIONAL IMPACT OF ENVIRONMENTAL LIABILITY ON REINSURANCE INDUSTRY IS CAUSED BY GREATER LIABILITY AND UNCERTAINTY, MULTIPLE EXPOSURES, AND MORE SEVERE SURPLUS DRAINS

The special nature of reinsurance and the various means of a reinsurer's participation in any liability area provide the industry with a unique perspective of which the Committee should be aware when considering environmental legislation. With regard to pollution, these factors have a greater impact on the reinsurers' liability and capacity for future involvement in the protection of RCRA and Superfund sites. The RAA believes that this impact is so serious that the reinsurance industry will probably continue to curtail its writings in this area. We are not saying that there will be no environmental liability reinsurance available in the market; there are several reinsurers currently providing coverage on a treaty and facultative basis, and they may continue to do so. However, we can say with certainty that there will not be enough reinsurance in the market for some time because of the general insurance industry concerns and the special reinsurance problems which we identify below.

- REINSURERS ASSUME HEAVIER ENVIRONMENTAL LIABILITY BURDEN THAN PRIMARY INSURERS BECAUSE OF PRIMARY INSURERS' LOW RETENTIONS AND REINSURERS' HIGH LIMITS AND LEVELS WITH PROPORTIONATELY LOWER PREMIUM

The reinsurance industry will continue to absorb losses from primary insurers disproportionate to the amount of premiums received. Reinsurers are hit harder by the environmental liability problem because most of that liability was passed on to reinsurers or primary insurers using low retentions. In contrast, many reinsurers retained a large portion of losses before retroceding their risks. One reinsurer estimated that during the early 1960's it was common for a primary insurer to offer $5 or $10 million limits with only $50,000 to $100,000 retentions, respectively. Although the limits and levels changed over the years, it remained true that the reinsurance industry ultimately absorbed from 65 to 90% of the total loss. However, the reinsurance segment represents only 10% of total insurance industry surplus!

The premiums paid for reinsurance coverage were also relatively low, especially for the higher layers in the excess of loss reinsurance portfolio. It was unlikely that these higher levels would be pierced with any frequency, and the premium was set accordingly. Pollution losses, however, are of such a catastrophic nature that, if any major incident occurs, it is likely to "blow" all the excess layers of coverage. This impact is more acute where legal expenses are included in the insurer's "ultimate net loss", because reinsurance limits are exhausted so much quicker, forcing higher layer reinsurers to indemnify before ever anticipated, if ever anticipated. Our underwriters have described pollution risks as an "all or nothing" loss; however, the "all" limits situation will become the trend while the past premium paid was predicated on "little or nothing" in liability. The result is that reinsurers' future liabilities will exceed the primary industry's retention as well as any premium received, no matter how well invested.

* LONG-TAIL NATURE OF ENVIRONMENTAL BUSINESS COMPOUNDS UNPREDICTABILITY, RATING AND RESERVING DIFFICULTIES, PARTICULARLY WHERE LATENCY FACTOR IS PRESENT

The "long-tail" nature of environmental liability is even more serious for reinsurers, thereby compounding reserving and rating problems. The "long-tail" refers to the substantial length of time between the policy period and the ultimate loss, often caused by a latency factor prevalent in the "toxic tort" area.

Due to the indemnification nature and claims reporting practices of the industry, a reinsurer may wait twice as long as the primary insurer to hear of a loss. Although the primary insurer is required to give notice of claims likely to involve reinsurance, it may evaluate the claim using discounting techniques or simply believe it can defeat the claim before reinsurance levels are touched. This notice problem appears most often in excess of loss reinsurance where the discounted claim and initial reserve fall within the primary insurer's retention. In addition, reports may be incomplete and the reinsurer is forced to reserve using inaccurate data. Finally, our claims persons have indicated that it is extremely difficult to pick up these reporting delays or errors, particularly on the treaty side where an entire line of business involving numerous policies are reinsured. This delay makes it extremely difficult for reinsurers to prepare for losses and consequently rate any future business on the basis of accurate loss information.

Unfortunately, under past contracts, we do not have data specific to pollution liability evidencing the slower development of reinsurance losses, although our workers' compensation and general liability studies are illustrative. The 1983 RAA Loss Development Study reported that 65% of workers' compensation losses were known after 8 years, while 80% of the general liability losses took 11 years to reach the reinsurer. Since general liability includes the "long-tail" lines, a comparison of primary insurer and reinsurer loss developments is helpful. After 4 years, the primary insurer knew 85% of ultimate losses, but the reinsurer knew only 40% after this same interval. Our bi-ennial studies also indicate a continued deterioration in loss development patterns for reinsurers.

- REINSURERS PROVIDING TREATY, FACULTATIVE AND DIRECT EXCESS COVERAGE ARE FACED WITH MULTIPLE EXPOSURES FOR SAME UNDERLYING LOSS

A reinsurer often provides treaty and facultative coverage to the same client or similar client companies. However, many reinsurers also write direct excess insurance in general liability as well as other lines. As a result, a single reinsurer could be "hit 3 ways" for any particular loss, and the complexity of the different coverages makes any final determination of the reinsurer's ultimate liability extremely difficult. When this "multiple exposure" effect is compounded with the "long-tail" problem, it is no wonder why reinsurers expect to feel the brunt of the pollution liability problem.

Consider one reinsurer's potential involvement at the Kin Buc Superfund site, where 95 plaintiffs recently sued 667 defendants for personal injury and property damage caused by exposure to hazardous substances deposited at the site. This reinsurer has identified 137 involvements to date that are either direct excess, facultative, or, to a lesser extent, treaty. If the exposure period is, say only 10 years, those 667 defendants may trigger thousands of policies. The reinsurer with 137 involvements must review 10 years of policies and comtracts just to check on coverage. At another Superfund site, this same reinsurer found 85 involvements in a suit filed against 190 defendants. We must emphasize that, in both cases, private lawsuits followed EPA Superfund designation and clean-up litigation. We must also emphasize that this single reinsurer has located involvement in 250 additional sites, each of which could give rise to a similar litigation pattern.

Our member companies recognize that this experience will be played out time and again during the coming years, and some are now attempting to computerize their claims information by site in order to get some grip on their potential liability. It is too early to pull any meaningful data, but we hope that this Committee will be interested in such findings in its future deliberations.

* REINSURERS MUST UNDERWRITE THE POLLUTION EXPERTISE OF THE PRIMARY INSURER RATHER THAN ORIGINAL INSURED BUT SUFFICIENT EXPERTISE IS LACKING IN BOTH PRIMARY AND REINSURANCE INDUSTRIES

Since reinsurers are not directly involved with the underwriting or claims-handling of the original insured, they must rely heavily on the expertise of the primary insurer. It is often said that the reinsurer underwrites its reinsured, but it is well known that expertise in the complex environmental area is lacking throughout the entire insurance community. Thus, the reinsurer is faced with uncertainties from the underlying risk and the primary insurer in addition to its own. It is not surprising that insurers and reinsurers are not fully capable of evaluating pollution risks, given that the Environmental Protection Agency is also struggling with this responsibility. All of these unknowns detract from predictability--an element essential to the insurability of any risk.

Many insurers and reinsurers have established environmental claims units to improve their capability, but the expense is enormous. Note also that these special units will evaluate claims filed largely under old policies, so that the expense comes out of new premiums paid for unrelated coverage.

* REINSURANCE INDUSTRY REPORTED ITS WORST RESULTS IN 1984 AND THE DRAMATIC SURPLUS DECREASE CAUSED BY THESE LOSSES WILL LESSEN CAPACITY FOR ENVIRONMENTAL RISKS

The entire insurance industry is experiencing its worst years in recent history, and reinsurers seem to be hit the hardest. The 1984 RAA Reinsurance Underwriting Review reported a combined ratio of 127.3 for professional reinsurers, up from 113.9 in 1983, and the sharpest annual increase ever found in our surveys. Several reinsurers have stopped writing facultative business due to these poor results, and a few others have ceased to write any new business. This fallout is undoubtedly due in part to intense competition and under-rating of all risks as well as unanticipated "toxic tort" liability. However, the result is that reinsurers desperately need to improve their financial conditions, and environmental liability insurance does not offer this potential to most companies.

The decrease in policyholder surplus occasioned by these poor results will prohibit reinsurers from providing sufficient capacity in many lines. Since the reinsurance industry's surplus dropped $130 million in a single year, the effect is quite severe. Under surplus-to-premium ratios enforced by state regulators, any new business written by reinsurers will be extremely limited. It is likely that reinsurers will fill any capacity with lines that promise some stability and profitability, and pollution is simply not one.

The RAA certainly hopes that this condition is temporary and that surplus will improve to allow expansion within lines and into new lines of business. However, we doubt that a complete market turnaround would result in enough capacity to meet insurance needs under our environmental laws, and this is due to all the other factors discussed in the AIA and RAA statement.

MAJOR CHANGES IN SUPERFUND AND TORT LAW ARE NECESSARY TO ENCOURAGE REINSURERS TO ESTABLISH OR INCREASE THEIR PARTICIPATION IN THE ENVIRONMENTAL LIABILITY MARKET

The RAA believes that a re-thinking of our environmental liability laws is in order, and that this broad effort should be undertaken independent of any insurance industry crisis. There is no doubt that major changes in the laws and their enforcement are necessary to secure a viable insurance and reinsurance market for the large population of hazardous waste generators, transporters, disposers, and removers. Such changes cannot guarantee this market but will at least eliminate some major impediments. The environmental liability problem, however, spreads far beyond the insurance industry, and we hope that Congress will look upon it as a societal problem requiring broad-based solutions.

The RAA would like to work with this Committee and Congress, as well as the Environmental Protection Agency and Department of Justice, to study the impact of Superfund and RCRA on insurance and other industries, as well as legislative and regulatory solutions that could secure a stronger insurance market along with prompt clean-up and balanced enforcement. We note that the AIA has proposed legislation amending Superfund to shift the emphasis to clean-up and remove retroactive liability, and we endorse that proposal as taking a step in the right direction. Several other federal laws and programs have been raised in the environmental liability context, and we hope that legislators and regulators will give them serious attention. We know that the insurance industry will.

The RAA urges this Committee to step back and look at the broad environmental liability issue rather than amend Superfund on a piece-meal basis. The RAA would be happy to provide the Committee with any assistance needed in this endeavor.

Mindy Pollack
Assistant General Counsel

TESTIMONY OF W. D. HOLLAND
Chairman and Chief Executive Officer
Synalloy Corporation

Before the Committee
on Environment and Public Works

Wednesday, April 3, 1985

Mr. Chairman, I am William D. Holland, Chairman of Synalloy Corporation, a diversified manufacturing firm consisting of six operating companies in five Southern states with seven plants. We have 505 employees and are headquartered in Spartanburg, South Carolina. Our principal products are textiles, stainless steel fabricated products, pipe and pressure vessels.

On April 16, 1982, the Environmental Protection Agency issued a revised interim final rule on liability coverage requirements for hazardous waste facility owners and operators pursuant to Section 3004(6) of the Resource Conservation and Recovery Act of 1976 (RCRA). Under the rule, an owner-operator may either be self-insured by demonstrating sufficient net worth to meet a financial test for liability coverage or obtain insurance. As a smaller manufacturer with a net worth of 20 million dollars, Synalloy must obtain liability coverage to meet the EPA requirement.

On March 14, 1985, Synalloy was informed by its insurer for non-sudden and gradual pollution insurance, Evanston Insurance Company, that it intends to withdraw from the market for environmental impairment liability and that coverage will no longer be available when our present policy expires on July 7, 1985. Our broker, Marsh and McLennan, is aggressively seeking to find a new souirce of coverage, but without success or with much hope of success. They tell us that there were eight companies offering this insurance in 1983, now there are only two, and

> "Both of the remaining underwriters are very reluctant to write chemical-related manufacturing companies such as yours and would rather utilize their insurance capacity to underwrite less hazardous risks. Marsh and McLennan is the largest insurance broker in the United States, and we cannot guarantee you that we will be able to place insurance coverage for you by your July '85 renewal date."
>
> "We understand that, if we cannot place this coverage, you will have to shut down your two chemical plants because the State required financial guarantees cannot be met."

The Department of Natural Resources for the State of Georgia has stated that, "The only alternative to providing the required certificate of liability insurance for non-sudden accidental occurrences are to either become self-insured by passage of the financial test, or to close the surface impoundment, landfill or land-treatment faciltiy." The South Carolina Department of Health and Environmental Control has also advised us that, if we do not obtain alternative coverage on or before July 7, 1985, closure proceedings must begin. We are, then, confronted with a series of EPA requirements that will sharply curtail two of our operations, probably close them and perhaps result in dissolution of the Company.

When the EPA issued its rule requiring liability coverage, the Agency recognized that "many commentators were concerned that insurance for non-sudden or gradual accidental occurrences will either not be available or, if available, be too expensive, especially for smaller firms." In response to these concerns, the rule provided smaller firms or operators with an additional period in which to comply with the regulation. The Agency assumed that "the availability of this insurance will increase further" during the initial two-year period. The EPA further stated:

> "The insurance market for coverage of non-sudden accidental occurrences has recently responded to increasing demand and there are good indications that this market can be expected to expand considerably in the near future. After carefully considering the issue, the Agency has concluded that insurance for non-sudden, accidental occurrences as required by these regulations will be available in a competitive market."

The Agency's statement continued with this promise:

> "However, this conclusion is based upon expected expansion in the number of firms providing insurance for

non-sudden, accidental occurrences. Consequently, the EPA will continue to monitor the developments of the market to ensure that the requirements of this regulation can be met."

This hearing is held today because the market for liability insurance has not increased, and it has, in fact, practically dried up. The situation is described by an article dated March 19, 1985, in The Wall Street Journal, which reported that, "In the last few months, the pollution-liability insurance field has virtually collapsed.....Insurers don't want to get involved." For Synalloy and other small manufacturers required under EPA regulations to obtain liability insurance or face closure of facilities, the growing rift between the insurance industry and the EPA has placed our futures - and those of our employees - in jeopardy.

On behalf of all smaller manufacturers required to obtain insurance under RCRA, I commend this Committee for convening this hearing as a first step to assuring that the financial responsibility provisions of RCRA can once again be met; however, Synalloy and other small manufacturers are faced with the imminent expiration of existing liability insurance contracts and penalties for non-compliance. I would appreciate this Committee's assistance in urging the EPA to fulfill its promise to monitor the insurance market to see that the requirements of the regulation can be met in the future and to direct the EPA's attention to the immediate need for interim relief.